United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

76-7053

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7053

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

Appellant,

-against-

ALLAN D. MILLER, M.D., individually and as the Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEIL, M.D., individually and as Director of Central Islip State Hospital; and DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA, and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue and Central Islip State Hospital whose names are unknown to plaintiff,

Appellees.

APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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STATEMENT OF RELEVANT DOCKET ENTRIES

7/7/75	Certified Copy of Judgement and Opinion reversing Order of District Court and remanding case for trial.
7/23/75	Request for entry of default as to defendants Sandra Grant. M.D., and Dusan Kosovich, M.D.; clerk's Note of Default filed.
7/24/75	Case called before Honorable Orrin G. Judd, D.J.; trial begun; continued on adjourment.
7/25/75	Both sides present; trial resumed; continued to 7/28/75.
7/28/75	Both sides present; trial resumed; continued.
7/29/75	Both sides present; trial resumed; plaintiff rests. Defendants' motions to dismiss granted as to O'Neill, and denied as to all other defendants. Defendants Ollins, Blankfeld, Miller, DaCorta and Dromgoole rest; defendants' motions to dismiss are renewed and denied; continued.
7/30/75	Both sides present; trial resumed. Plaintiff and defendants sum up; Judge Judd charges jury. Jury retires to deliberate at 2:40 p.m.; returns at 2:55 p.m. for further intstructions. Jury resumes deliberations, then asks to go home at 4:10 p.m.; trial continued.
7/31/75	Both sides present;trial resumed. Jury finds verdicts in favor of all defendants on question of liability at 2:30 p.m. Jury polled and discharged; plaintiff's motion to set aside verdict and for new trial denied; adjourned to 9/19/75 for motions.
8/1/75	Form of verdict filed; plaintiff's Memorandum of Standard of Personal Responsibility filed.
9/26/75	Plaintiff files motion to set aside verdict and for a new trial, with Memorandum of Law; affidavit of George A. Weiler in opposition; case called; motions argued; decision reserved.

12/17/75	Memorandum and Order denying motion for new trial, but setting aside verdicts for defendants Grant and Kosovic; judgment ordered against Kosovic for $500 plus costs, and against Grant for $300 plus costs.
12/19/75	Judgments filed against Grant and Kosovic, and in favor of all other defendants.
1/14/76	Notice of Appeal filed.
2/19/76	Order filed allowing plaintiff to appeal in forma pauperis.
3/2/77	Decision and Order, entered denying plaintiff's second motion for a new trial

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, Plaintiff, -against- ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff, Defendants.	Civil Action No. VERIFIED COMPLAINT

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION AND OTHER RELIEF

Plaintiff, for her verified complaint, alleges:

Jurisdiction

1. Plaintiff brings this action pursuant to 28 U.S.C. Sections 1343, 2201, 2202, 2281 and 2284, and 42 U.S.C. Section 1983. Plaintiff seeks relief under the First, Fourth and Fourteenth Amendments to the United States Constitution.

Plaintiff has no adequate state remedy with respect to the equitable relief sought herein.

Parties

2. Plaintiff MIRIAM WINTERS is a citizen of the United States and resides at the St. George Hotel, 51 Clark Street, Brooklyn, New York.

3. Plaintiff brings this action on her own behalf and on behalf of all persons similarly situated. The class is composed of (a) persons who have been, or now are, involuntarily confined to public mental hospitals in New York and who, while confined, were subjected to injections, electroshock therapy and other physical treatments, without their consent, and against their stated objection that such treatment would be contrary to their religious beliefs and principles; (b) persons who have been, or now are, involuntarily confined to public mental hospitals in New York and who, while confined, were subjected to injections, electroshock therapy and other physical treatments, without their consent, and against their stated objections, even though they had never been judicially declared incompetent; (c) persons who have been, or are now, involuntarily confined to public mental hospitals in New York and who, while confined, were subjected to injections, electroshock therapy

and other physical treatments, without their consent, and against their stated objections, even though they had never been judicially declared to be mentally ill; and (d) persons who have been, or now are, involuntarily confined to New York State mental hospitals, and who, while confined, were fingerprinted and/or photographed without their consent, and against their stated objection, even though they were not then charged with any crime. The class is too numerous to bring before the Court. There are questions of law common to the class, and the rights of all members of the class will be adequately represented by plaintiff.

4. Defendant ALAN D. MILLER, M.D., is sued herein as Commissioner of Mental Hygiene of the State of New York, with offices at 44 Holland Avenue, Albany, New York 11208, and 15 Park Row, New York, New York 10038.

5. Defendant ALEXANDER THOMAS, M.D., is sued herein as Director of the Psychiatric Division, Bellevue Hospital Center, 26th Street and First Avenue, New York, New York 10016 (cited hereafter as "Bellevue").

6. Defendant FRANCIS J. O'NEILL, M.D., is sued herein as Director of Central Islip State Hospital, Central Islip,

New York (cited hereafter as "Central Islip").

7. There are other defendants, whose names are not presently known to plaintiff, all of whom are doctors on the staff of Bellevue or Central Islip who administered involuntary physical treatments to plaintiff.

Statutes Challenged

8. Plaintiff challenges the constitutionality of New York Mental Hygiene Law Sec. 34 (9-a) (fingerprints and photographs) and such other statutes, if any, as defendants may rely upon as authorization for involuntary treatment in the circumstances here described. Each of the defendants, at all times relevant herein, was acting under color of a statute, ordinance, regulation, custom or usage of the State of New York.

First Cause of Action

9. For ten years I have been a student and follower of Christian Science Religion.

10. Since 1955, I have received financial assistance from the New York City Department of Social Services ("Welfare Department"). I told the Welfare Department that I am a follower of Christian Science, and in 1967, my welfare case

worker contacted a Christian Science Practitioner who verified that fact.

11. On May 1 or 2, 1968, while I was residing at the King Edward Hotel in New York, New York, the hotel management and my welfare case worker, Mr. Karren, demanded that I move to another room that I felt was inadequate to meet my needs. I refused to change rooms, offered rent for the room I was occupying, and refused to admit anyone to my room.

12. Upon information and belief, the Welfare Department thereupon contacted the New York City Police Department and/or Bellevue Hospital and requested that I be taken from my hotel room and committed to Bellevue.

13. On May 2, 1968, I refused to permit police officers and Bellevue hospital attendants to enter my room because they did not adequately inform me of their identity or reason for demanding entrance.

14. The police and hospital attendants forcibly entered my room and took me to Bellevue Hospital against my will.

15. Upon arrival at Bellevue on May 2, 1968, I personally informed each doctor who examined me or attempted treatment that I followed the teachings of Christian Science

and it was therefore my religious belief that I should refuse medical treatment. Upon information and belief, the Bellevue Hospital records list my religion as "Christian Scientist."

16. At Bellevue, I refused medication, was then threatened by the hospital staff with forced medication by injection, still refused, and was forcibly subjected, against my will, to an injection. Thereafter, under the continuing threat of injection, I did orally receive and take medication, against my will and stated religious beliefs.

17. On May 13, 1968, I was transferred from Bellevue and immediately involuntarily committed to Central Islip. Upon information and belief, I was committed to Central Islip on the authority of an application and certificate under Mental Hygiene Law Sec. 72, and said application and certificate indicated I was a follower of Christian Science. Upon information and belief, said application and certificate are part of the hospital record at Central Islip.

18. Upon arrival at Central Islip, I personally informed each doctor who examined me or attempted treatment that I followed the teachings of Christian Science and it was therefore my religious belief that I should refuse medical treatment.

19. At Central Islip, I refused medication, was then threatened by the hospital staff with forced medication by injection, still refused, and was forcibly subjected, against my will, to an injection. Thereafter, under the continuing threat of injection, I did orally receive and take medication, against my will and stated religious beliefs.

20. I informed Mrs. Nina Goldstein, a Mental Health Information Service lawyer, that I was a follower of Christian Science and that I therefore objected to medical treatment. She agreed to request the attending doctors to stop such treatment and, upon information and belief, she did so request. Nevertheless, the doctors continued to give me medication, against my will, until discharged on July 18, 1968.

21. At no time while confined to Bellevue or Central Islip was I a behavior or management problem. While at Central Islip I was given a "Female Honor Card" which authorized me to leave the ward and walk freely about the hospital grounds.

22. Being forced to receive medication in violation of my religious beliefs caused me great emotional and mental anguish, pain and suffering, indignity and humiliation, and caused me to become physically ill.

Second Cause of Action

23. The allegation of paragraphs 1 through 22 of this verified complaint are hereby incorporated by reference.

24. At no time have I ever been judicially declared to be incompetent to manage my personal or business affairs.

25. At no time has a committee, conservator or guardian been appointed to manage my personal or business affairs.

26. At no time have I ever been judicially declared to be mentally ill, mentally defective, or insane.

27. At all times mentioned herein I was not mentally ill and was fully competent and capable to make responsible decisions concerning my business and personal affairs, including the decision to accept or reject medical treatment.

28. Being forced to receive medication against my personal decision and will caused me great emotional and mental anguish, pain and suffering, indignity and humiliation, and caused me to become physically ill.

Third Cause of Action

29. The allegations of paragraphs 1 through 28 of this

verified complaint are hereby incorporated by reference.

30. While at Central Islip, I was required to submit to being fingerprinted and photographed, against my will, and over my stated objection that involuntary fingerprinting and involuntary photographing constituted violations of my civil rights.

31. I have never been convicted or charged with any crime. I was confined at Central Islip as a civilian, not as a prisoner or defendant.

32. Fingerprinting and photographing serve no therapeutic, identification or other valid purpose. Upon information and belief, the New York State Department of Mental Hygiene has requested the New York State Legislature to repeal Mental Hygiene Law Sec. 34 (9-a), which requires civil patients to be fingerprinted and photographed.

33. Being required to submit to involuntary fingerprinting and photographing against my will and stated objection caused me great emotional and mental anguish, pain and suffering, indignity and humiliation.

WHEREFORE, plaintiff requests the following relief:

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1. The convening of a special United States District Court of three judges to hear and determine this action, pursuant to 28 U.S.C. Sections 2281 and 2284.

2. An order determining that this action may properly proceed as a class action pursuant to Rules 23(a) and 23(b) (2) and (3) of the Federal Rules of Civil Procedure.

3. The issuance of a declaratory judgment defining the constitutional rights of the plaintiff and declaring Mental Hygiene Law Section 34(9-a) unconstitutional on its face and unconstitutional as applied to plaintiff and all others similarly situated; and the issuance of a declaratory judgment declaring unconstitutional such other sections of the Mental Hygiene Law, if any, or such ordinance, regulation, custom or usage as defendants may rely upon as authority for involuntary treatment in the circumstances described herein.

4. The granting of a preliminary and permanent injunction restraining defendants and their agents and employees from further violation of plaintiff's constitutional rights and the constitutional rights of all others similarly situated, enjoining them from further enforcement of Mental Hygiene Law Section 34(9-a), and directing them to return to plaintiff all fingerprint and photographic records pertaining to

plaintiff.

5. Damages in the amount of $50,000 for plaintiff.

6. The granting of such other relief as to the Court may seem just and proper.

S U M M O N S

To the above named Defendant:

You are hereby summoned and required to serve upon Bruce J. Ennis, plaintiff's attorney, whose address is c/o New York Civil Liberties Union, 156 Fifth Avenue, New York, N.Y. 10010 212-929-6076, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, Plaintiff, -against- ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff, Defendants.	ANSWER 69 C 783 OGJ

Defendant Catherine Dromgoole, by her attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, for her answer to the first amended complaint herein, respectfully, upon information and belief:

FIRST: Denies each and every allegation contained in paragraphs 1, 3, 8, 22, 27, 28, 32 and 33 of plaintiff's complaint.

SECOND: Admits each and every allegation contained in paragraphs 2 and 4 of plaintiff's complaint.

THIRD: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 24, 25 and 30 of plaintiff's complaint.

FOURTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 17, 19, 20 and 21 of plaintiff's complaint, except as is otherwise shown by the records of the Central Islip State Hospital.

FIFTH: Denies so much of the allegations contained in paragraph 6 of plaintiff's complaint as alleges that Francis J. O'Neill is the Director of the Central Islip State Hospital and as to the remaining allegations in said paragraph denies knowledge or information sufficient to form a belief as to their accuracy, except admit that defendant Catherine Dromgoole was and is employed by the Central Islip State Hospital from 1951 to present, as a staff psychiatrist.

SIXTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 18 of plaintiff's complaint, except denies so much of the allegations therein contained as alleges or can be construed to allege that defendant treated said patient or examined said patient against her will, or ordered or administered any treatment to plaintiff over her objections, or was informed by plaintiff to her objections to medical treatment on religious or other grounds.

SEVENTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 19 of plaintiff's complaint except denies ever ordering or administering medication to plaintiff against her will or stated religious beliefs.

AS AND FOR A FIRST, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

EIGHTH: Upon information and belief, defendant Dromgoole had no contact with plaintiff other than conducting an interview to determine whether plaintiff should be discharged.

NINTH: The interview did not involve any physical examination or administration of any devices or medication.

TENTH: Upon information and belief, had plaintiff objected to the administration of any medical psychological examinations, defendant would not have conducted any.

ELEVENTH: Upon information and belief, had plaintiff objected to the administration of any medicine or therapeutic regimen, defendant would not have administered any, except to the extent medically necessary to save life, or to prevent a plaintiff from being danger to herself or others.

AS AND FOR A SECOND, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

TWELFTH: Upon information and belief, all actions herein complained of took place before August 1, 1968.

THIRTEENTH: Upon information and belief, plaintiff or her attorney were aware of defendant's identity, on or before October 5, 1969.

FOURTEENTH: Upon information and belief, plaintiff filed the first amended complaint, naming defendant as a party on February 15, 1974.

FIFTEENTH: Upon information and belief, more than three years elapsed between the accrual of plaintiff's action, if any, and the interposition of the complaint against defendant Dromgoole.

SIXTEENTH: Upon information and belief, more than three years elapsed between the time plaintiff or her attorneys discovered or could have, with due diligence, discovered defendant Dromgoole's identity and the time the claim, if any, against Dromgoole, was interposed.

SEVENTEENTH: Insofar, as a claim is interposed against defendant Dromgoole, it is barred by the statute of limitation.

AS AND FOR A THIRD, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

EIGHTEENTH: The complaint or several parts thereof fail to state a claim for which relief can be granted.

AS AND FOR A FOURTH, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

NINETEENTH: Defendant is employed by the State of

New York, charged by virtue of her employment, with affording treatment to those admitted to Central Islip State Hospital.

TWENTIETH: At all times hereinbefore relevant defendant proceeded within the scope of her duties, in good faith, without malicious intent and in the reasonable belief that she was not violating plaintiff's clearly established constitutional rights.

WHEREFORE, defendant Dromgoole prays this Court enter a judgment:

A) Denying each and every prayer of relief prayed for by plaintiff;

B) Dismissing the complaint against her; and

C) Granting such other, further and different relief that, as to this Court, may appear just and proper, together with necessary costs and disbursements.

DATED: New York, New York
July 16, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Dromgoole
By

/s/
STANLEY L. KANTOR
Assistant Attorney General
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Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5168

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, Plaintiff, -against- ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to plaintiff, Defendants.	69 Civ. 783 JUDGE JUDD Defendant Demands Trial By Jury Reg. 618 Fol. 335 LD 5206-69

The defendant, HOWARD M. BLANKFELD s/h/a H. BLANKFELD, answering the first amended complaint herein, upon information and belief, alleges:

AS TO JURISDICTION:

FIRST: Denies each and every allegation contained in paragraph of the first amended complaint designated "1".

AS TO PARTIES:

SECOND: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the alle-

gations contained in paragraph of the first amended complaint designated "2".

THIRD: Denies each and every allegation contained in paragraphs of the first amended complaint designated "3" and "7".

FOURTH: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs of the first amended complaint designated "4" and "6" except that the defendant ALAN D. MILLER, M.D. is sued herein individually and as Commissioner of Mental Hygiene of the State of New York and the defendant, FRANCIS J. O'NEILL, M.D. is sued herein individually and as Director of Central Islip State Hospital.

FIFTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "5" except that the defendant, ALEXANDER THOMAS, M.D. is sued herein individually and as Director of Psychiatric Division, Bellevue Hospital Center, located at 26th Street and First Avenue, New York, New York 10016 and that the defendants, H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT and GERALD OLLINS were doctors on the staff of Bellevue Hospital.

AS TO THE STATUTES CHALLENGED:

SIXTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "8".

AS TO THE FIRST CAUSE OF ACTION:

SEVENTH: Denies each and every allegation contained in paragraphs of the first amended complaint designated "9", 11", "12", "13", "14", "15", "16", "21", and "22".

EIGHTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "10" except that at various times the plaintiff was a recipient of financial assistance from the New York City Department of Social Services.

NINTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "17" except that on May 13, 1968, the plaintiff was transferred from Bellevue to Central Islip and was committed therein on the authority of an application and certificate under Mental Hygiene Law Section 72.

TENTH: Denies each and every allegation contained in paragraphs of the first amended complaint designated "18", "19" and "20" insofar as the same refers to or may in anywise affect the defendant, HOWARD M. BLANKFELD.

AS TO THE SECOND CAUSE OF ACTION:

ELEVENTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "23", except as otherwise pleaded herein.

TWELFTH: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs of the first amended complaint

designated "24" and "25".

THIRTEENTH: Denies each and every allegation contained in paragraphs of the first amended complaint designated "26", "27" and "28".

AS TO THE THIRD CAUSE OF ACTION:

FOURTEENTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "29" except as otherwise pleaded herein.

FIFTEENTH: Denies each and every allegation contained in paragraph of the first amended complaint designated "30" insofar as the same refers to, or may in anywise affect the defendant, HOWARD M. BLANKFELD.

SIXTEENTH: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph of the first amended complaint designated "31".

SEVENTEENTH: Denies each and every allegation contained in paragraphs of the first amended complaint designated "32" and "33".

AS AND FOR SEPARATE, AFFIRMATIVE DEFENSES,
THE DEFENDANT, HOWARD M. BLANKFELD, ALLEGES:

EIGHTEENTH: The United States Court of Appeals in the present case of WINTERS v. MILLER, 446 F.2d 65, 71 (2d Cir. 1971) declared Mental Hygiene Law Section 34 (9-2) constitutional.

NINETEENTH: The convening of a special United States District Court of three judges would be a nullity. Such a court may not reverse the determination of the United States Court of Appeals.

TWENTIETH: The issuance of a declaratory judgment declaring Mental Hygiene Law Section 34 (9-a) to be unconstitutional would be contrary to the law of the case as determined by the United States Court of Appeals.

TWENTY-FIRST: The granting of a preliminary and permanent injunction of any sort would be contrary to law and the facts of this case. Plaintiff has not set forth a single allegation that she has been given any medication against her will since her discharge from Central Islip on July 18, 1968, or that any of her constitutional rights have been violated in any manner since that date.

TWENTY-SECOND: This action should not be maintained as a class action. The alleged class is not so numerous that joinder of all parties is impracticable.

TWENTY-THIRD: Should this Court declare that joinder of all parties is impracticable, the class action should be dismissed pursuant to the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, N.Y. Law Journal, May 30, 1974, P.1. Plaintiff must send individual notice to all class members whose name and address may be ascertained through reasonable effort, with plaintiff paying the cost of such notice.

TWENTY-FOURTH: At no time did the defendant, HOWARD M. BLANKFELD, commit any of the acts alleged in the first amended complaint, but if it be determined that he did commit any of the said acts, and if it be determined that such acts were committed within the scope of his employment, then all such acts

were performed in good faith, without malice and with reasonable and probable cause in the performance of his duties.

WHEREFORE, the defendant, HOWARD M. BLANKFELD demands judgment dismissing the first amended complaint herein, with costs.

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendant
Office & P.O. Address:
Municipal Building
Borough of Manhattan
New York, New York 10007

By: /s/ SAUL BERNSTEIN
SAUL BERNSTEIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS,

Plaintiff,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants.

ANSWER

69 C 783 OGJ

Defendant THOMAS DaCORTA, by his attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, for his answer to the first amended complaint herein, respectfully, upon information and belief:

FIRST: Denies each and every allegation contained in paragraphs 1, 3, 8, 22, 27, 28, 32 and 33 of plaintiff's complaint.

SECOND: Admits each and every allegation contained in paragraphs 2 and 4 of plaintiff's complaint.

THIRD: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 24, 25 and 30 of plaintiff's complaint.

FOURTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 17, 19, 20 and 21 of plaintiff's complaint, except as is otherwise shown by the records of the Central Islip State Hospital.

FIFTH: Denies so much of the allegations contained in paragraph 6 of the complaint as alleges that FRANCIS J. O'NEILL is the Director of Central Islip State Hospital, and as to the remaining allegations in said paragraph, denies knowledge or information sufficient to form a belief as to their accuracy, except admit that defendant DaCORTA, a physician duly licensed to practice medicine in the State of New York, was employed by Central Islip State Hospital as a staff psychiatrist from September, 1965 to October, 1973.

SIXTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 18 of plaintiff's complaint, except denies so much of the allegations therein contained as alleges or can be construed to allege that defendant treated said patient or examined said patient against her will, or ordered or administered any treatment to plaintiff over her objections, or was informed by plain-

tiff to her objections to medical treatment on religious or other grounds.

SEVENTH: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 19 of plaintiff's complaint except denies ever ordering or administering medication to plaintiff against her will or stated religious beliefs.

AS AND FOR A FIRST, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

EIGHTH: Upon information and belief, defendant DaCORTA had no contact with plaintiff except performing the ministerial acts of approving her transfer from involuntary to voluntary status, and approving her discharge.

NINTH: None of the acts performed involved any physical, medical or other examination or the administration of any devices or medication.

TENTH: Upon information and belief, had plaintiff objected to the administration of any medical psychological examinations, defendant would not have conducted any.

ELEVENTH: Upon information and belief, had plaintiff objected to the administration of any medicine or therapeutic regimen, defendant would not have administered any, except to the extent medically necessary to save life, or to prevent a plaintiff from being danger to herself or others.

AS AND FOR A FIRST, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

TWELFTH: Upon information and belief, all actions herein complained of took place before August 1, 1968.

THIRTEENTH: Upon information and belief, plaintiff or her attorney were aware of defendant's identity, on or before October 5, 1969.

FOURTEENTH: Upon information and belief, plaintiff filed the first amended complaint, naming defendant as a party on February 15, 1974.

FIFTEENTH: Upon information and belief, more than three years elapsed between the accrual of plaintiff's action, if any, and the interposition of the complaint against defendant DaCORTA.

SIXTEENTH: Upon information and belief, more than three years elapsed between the time plaintiff or her attorneys discovered or could have, with due diligence, discovered defendant DaCORTA's identity and the time the claim, if any, against DaCORTA, was interposed.

SEVENTEENTH: Insofar as a claim is interposed against defendant DaCORTA, it is barred by the statute of limitations.

AS AND FOR A THIRD, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

EIGHTEENTH: The complaint or several parts thereof fail to state a claim for which relief can be granted.

AS AND FOR A FOURTH, SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

NINETEENTH: At all times herein relevant, defendant was employed by the State of New York, charged by virtue of his employment with affording treatment to those admitted to Central Islip State Hospital.

TWENTIETH: At all times herein relevant, defendant proceeded within the scope of his duties, in good faith, without malicious intent and in the reasonable belief that he was not violating plaintiff's clearly established constitutional rights.

WHEREFORE, defendant DaCORTA prays this Court enter a judgment:

A) Denying each and every prayer for relief prayed for by plaintiff;

B) Dismissing the complaint against him; and

C) Granting such other, further and different relief that, as to this Court, may appear just and proper, together with necessary costs and disbursements.

Dated: New York, New York
July 16, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant DaCorta
By

STANLEY L. KANTOR
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5168

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, Plaintiff, -against- ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff, Defendants.	ANSWER 69 Civ. 783

Defendants Miller and O'Neill, for their answer to the complaint of plaintiff, by their attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, allege as follows:

1. Admit the allegation of paragraph "4" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "5", "24", "25", "26" and "31" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "2", "7", "9", "10", "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", "21"

and "30" of the complaint, except what the records of the New York State Department of Mental Hygiene and Central Islip State Hospital may otherwise show.

4. Deny the allegations contained in paragraphs "1", "3", "6", "8", "22", "27", "28", "32" and "33" of the complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE:

5. By order of the United States Court of Appeals for the Second Circuit, dated May 26, 1971, the dismissal of plaintiff's "Third Cause of Action" contained in paragraphs "29-33" of the complaint by this Court on November 21, 1969 was affirmed and hence should be stricken from the complaint.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE:

6. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE:

7. The complaint is moot.

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE:

8. Plaintiff has not suffered any damages by reason of the treatment she received at Central Islip State Hospital.

AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE:

9. Neither defendants Miller or O'Neill ever personally treated plaintiff or ever personally directed treatment of

plaintiff or had ever had personal knowledge of the treatment given plaintiff at Central Islip State Hospital and hence, under Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) are not liable for any damages.

WHEREFORE, defendants Miller and O'Neill demand judgment dismissing the complaint against them, with costs.

Dated: New York, New York
January 29, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Miller and O'Neill
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-7562

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, Plaintiff, -against- ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff, Defendants.	69 CIV 783 J.O.J. ANSWER TO AMENDED COMPLAINT Defendants Demand A Trial By Jury

The defendants, ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; and GERALD OLLINS, answering the amended complaint herein, upon information and belief, allege:

FIRST: Deny each and every allegation contained in paragraphs of the amended complaint designated "1" through "7f" inclusive.

AS TO THE FIRST CAUSE OF ACTION:

SECOND: Deny each and every allegation contained in

paragraphs of the amended complaint designated "8" through "22" inclusive.

AS TO THE SECOND CAUSE OF ACTION:

THIRD: Deny each and every allegation contained in paragraphs of the amended complaint designated "23" through "28" inclusive.

AS AND FOR SEPARATE, AFFIRMATIVE DEFENSES:

FOURTH: The pleadings set forth in the amended complaint fail to state a cause of action pursuant to 42 U.S.C. §1983.

FIFTH: Petitioner has refrained from commencing this action against the defendant, ALEXANDER THOMAS by service of a complaint, and against defendant, GERALD OLLINS by service of an amended complaint, and has thereby been guilty of such laches as should in equity bar the petitioner from maintaining this action.

SIXTH: The cause of action of assault as alleged in the amended complaint herein allegedly accrued on or about May 2, 1968. Pursuant to CPLR §215(3) of the State of New York, this action had arisen more than one (1) year prior to the commencement of this action against these defendants and therefore is time barred.

WHEREFORE, the defendants, above named, demand judgment dismissing the amended complaint herein, with costs.

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants,
Office and P.O. Address:
Municipal Building
Borough of Manhattan
New York, N.Y. 10007

By: _____
SAUL BERNSTEIN
Reg. #Folio #617 373
L.D. #5206-69

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—September Term, 1970.

(Argued October 7, 1970 Decided May 26, 1971.)

Docket No. 34521

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

—v.—

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

446 F.2d 65
(2d Cir. 1974).

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge,* granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action

brought pursuant to the federal civil rights statutes, 42 U.S.C. §1983 and 28 U.S.C. §1343(3). 306 F. Supp. 1158 (1969). Reversed and remanded.

BRUCE J. ENNIS and WILLIAM H. PRATT (New York Civil Liberties Union, New York, N. Y.), *for Plaintiff-Appellant.*

EDMUND B. HENNEFELD (J. Lee Rankin, Corporation Counsel of the City of New York, New York, N. Y., Stanley Buchsbaum, of counsel), *for Defendant-Appellee Thomas.*

JOEL H. SACHS, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Defendants-Appellees Miller and O'Neill.*

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SMITH, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York (Anthony J. Travia, *Judge*) granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action brought pursuant to the federal civil rights statutes [42 U.S.C. §1983 and 28 U.S.C. §1343(3)]. The opinion below is reported at 306 F. Supp. 1158 (1969). We reverse and remand for further proceedings as to the claim for damages resulting from the forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment.

As a preliminary matter we note that jurisdiction is properly founded under 28 U.S.C. §1343(3) since the rights

infringed are unquestionably those of "personal liberty" rather than "property." [*Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969); *Johnson* v. *Harder*, —— F.2d —— (Docket No. 35168, decided).]

Miss Miriam Winters is a 59 year-old spinster who has been supported under public assistance for over 10 years. For several years she had lived in a hotel in Brooklyn, New York and had created some difficulty there because of her constant demands that she be given a room with a private bath and because of her alleged failure to maintain a proper state of personal cleanliness.

In early 1967, she was told by her welfare case worker that she could obtain a room with a private bath with the approval of a physician or a psychiatrist. Accordingly, at her request, she was seen by Dr. Robert Reich, a psychiatric consultant to the Department of Welfare. Following this examination Miss Winters was told that she would be given a room with a private bath if she would move to the King Edward Hotel in Manhattan, which she agreed to do, and in mid-April she took up residence there. On May 2, 1968 when Miss Winters attempted to pay her rent for that month she was told by the hotel management that she could not continue to occupy the room she was in but would have to move to another room in the same hotel. This she refused to do, and as a result, the hotel management summoned the police, and she was taken by them to Bellevue Hospital where she was involuntarily admitted pursuant to section 78(1) of the New York Mental Hygiene Law.[1]

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1 New York Mental Hygiene Law, Section 78(1):

"The Director of any hospital maintaining adequate staff and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care, or treatment."

On May 7, 1968 appellant was examined by two staff psychiatrists at Bellevue who certified her need for care pursuant to section 72(1) of the New York Mental Hygiene Law which provides for commitment for up to 60 days upon the filing of a "two physician certificate."[2]

For 10 years prior to her admission to Bellevue Miss Winters had been a practicing Christian Scientist. When she was admitted she refused to allow a doctor to take her blood pressure stating to him that she was a Christian Scientist, and the Bellevue records contain several references to this fact indicating that the hospital clearly had notice of her religious beliefs. In spite of this, however, and over her continued objections she was given medication (for the most part rather heavy doses of tranquilizers, both orally and intramuscularly) continually from the time of her admission until she was discharged on June 18, 1968. On May 13, 1968 she was transferred from Bellevue to the Central Islip State Hospital on Long Island. Again the record clearly indicates that she brought her objections to physical medication to the attention of the hospital staff, but her protests were ignored. 68

The primary question raised in this appeal is whether appellant's constitutional rights were violated when she was given medical treatment over her objections, which

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2 New York Mental Hygiene Law, Section 72(1):

"The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission by . . . any public welfare officer of the town . . . or in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital or by the director or head of any other hospital where such person may be."

were religious in nature, and whether she is therefore entitled to relief under the federal civil rights statutes.

It should be emphasized at the outset that appellant had never been found by any court to be "mentally incompetent," nor, so far as the record shows, were any facts alleged by the medical personnel who attended her which would justify a finding by a court of "mental incompetence." Neither did any court ever find that she was "mentally ill," although the two physicians who examined her (pursuant to section 72(1)) did state that in their opinion she was suffering from a "mental illness."

However, the law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs.[3] *Sengstock* v. *Sengstock*, 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958); *Finch* v. *Goldstein*, 245 N.Y. 300 (1927).

It is clear and appellees concede that if we were dealing here with an ordinary patient suffering from a physical ailment, the hospital authorities would have no right to impose compulsory medical treatment against the patient's will and indeed, that to do so would constitute a common law assault and battery. The question then becomes at what point, if at all, does the patient suffering from a mental illness lose the rights he would otherwise enjoy in this regard.

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3 Of course, certain prior actions of persons adjudged mentally incompetent may subsequently be found voidable once incompetency is judicially established.

The court below was apparently of the view that *any* patient alleged to be suffering from a mental illness of *any* kind (even those confined under the "emergency" provisions of section 78(1) where the allegations of mental illness need not be made by a physican) loses the right to make a decision on whether or not to accept treatment. Judge Travis reasoned as follows:

> In mental cases, the public interest in treating and caring for patients is greater than the public interest in cases of physical illness. Most patients who are physically ill will be able to determine that they need treatment and, when informed by their physicians, will be able to make a reasoned decision as to the type of treatment to which they wish to subject themselves. But a mental patient, because of the nature of his illness, may be unable either to seek appropriate treatment or to determine what treatment to allow. For the physically ill person, where there are no dependent children or communicable diseases involved, the danger from a refusal on religious or any other grounds to allow a particular type of treatment may be that the patient will die. Only the patient and his immediate family are likely to be aggrieved or injured as a result. On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense. Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practitioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step

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backward in the history of mental hygiene. [App. p. 124a].

Appellant argues, however, that if we concede the right of others to refuse treatment because they are Christian Scientists or hold similar religious views in this regard, then in the present case, where there is clear evidence that appellant's religious views pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees substituting their own judgment for that of their patient. The Illinois Supreme Court in *In Re Brooks Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965) recently considered this question at some length.

> When approaching death has so weakened the mental and physical faculties of a theretofore competent adult without minor children that she may properly be said to be (legally) incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept knowing death would result from such refusal? [205 N.E.2d at 438].

The court answered this question in the negative and ruled that even if she were found to be legally incompetent, she nevertheless was entitled to refuse treatment because of her religious beliefs.

To what extent then may the state constitutionally compel actions which violate an individual's religious beliefs? The Supreme Court has here, as in a number of other areas, arrived at an "ad hoc" balancing test which ex-

amines the facts of each particular case to establish the contours of the free exercise clause rather than attempting to formulate any *per se* rules. The leading case is Mr. Justice Jackson's opinion in *West Virginia* v. *Barnette*, 319 U.S. 624 (1943).

> In weighing the arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases where it is applied for its own sake. The test of legislation which collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include so far as the due process test is concerned, power to impose all the restrictions which the legislature may have a "rational basis" for adopting. But freedom of speech and of the press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. [319 U.S. at 639].

It is precisely the same error of reasoning suggested by Mr. Justice Jackson that appellees and the court below made in the present case. At most, the arguments and cases on which they rely support the finding of a "rational

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basis" for the state acting in the way it did in the circumstances of Miss Winters' case, but First Amendment rights do not rest on such "slender grounds."

The appellees suggest a number of similar situations where the courts have held that the state's interest outweighs any First Amendment rights. [E.g. *Jacobson* v. *Massachusetts*, 191 U.S. 11 (1905) (compulsory vaccination); *Pierce* v. *Massachusetts*, 321 U.S. 158 (1944) (violation of the child labor laws); *Reynolds* v. *United States*, 98 U.S. 145 (1878) (polygamy); *People* v. *Handzik*, 410 Ill. 295, 102 N.E.2d 340 (1951) (criminal prosecution of faith healers who practice medicine without a license); *People* v. *Pierson*, 176 N.Y. 201 (1903) (serious illness of a child). These cases are, however, inapposite for each involved a clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his "free exercise" rights. In the present case, the state purports to find an "overriding secular interest of public health and welfare" in the "care and treatment of persons suffering from a mental disorder or defect and [in] the protection of the mental health of the state." Yet there is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party. The appellees rely on the fact that the Bellevue authorities found that she was "possibly" harmful to herself and to others. (This conclusion was indicated on one medical form after *one* examination, although at all other examinations conducted while she was hospitalized there was no indication of such tendencies.) Appellant, however, is not suggesting in this case that the authorities could not legally retain her in the

hospital, but rather only that her First Amendment rights were violated as a result of compulsory medication.

The appellees also rely on Judge Skelly Wright's decision in *Application of President and Fellows of Georgetown Hospital*, 331 F.2d 1000 (D.C. Cir.), *rehearing denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964). There the patient had refused a blood transfusion on religious grounds where she "was *in extremis* and hardly *compos mentis* at the time in question." What appellees neglect to mention, however, is that Judge Wright was very careful to limit his action to the extreme circumstances there present.

> The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find that the law required action, was a risk I was unwilling to accept. [331 F.2d at 1009-1010.]

Finally, the appellees argue that the state was acting as *parens patriae* with respect to Miss Winters and therefore had the responsibility as well as the right to decide what was best for her under the circumstances. It is the state's *parens patriae* power which had been the legal basis for the long series of court decisions which have denied parents absolute religious freedom with respect to various aspects of the care and upbringing of their children. The appellees go on to state "[i]n the area of mental health too, the State assumes the ultimate responsibility for the care of its citizens. It is fundamental to New York and federal law that the State acts in *parens patriae* as concerns mentally incompetent persons."

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The basic fallacy of appellee's case thus becomes obvious. While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her. As appellant points out, even if there is some way to find the kind of compelling state interest required to override the First Amendment, there clearly was not a compelling interest in so summarily forcing her to do so. Regular hearings of the New York Supreme Court are held in Bellevue Hospital every Tuesday morning. Plaintiff was admitted on Thursday evening. If appellees had respected her wishes for only four days, they could have brought her before the court for judicial resolution of the issue. At this hearing the appellant might have been able to persuade the court that she was not mentally ill. Or the court might have found that other alternatives would suffice. Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951):

> This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.

Having concluded, therefore, that the appellant has stated a claim on which relief may be granted, we remand

the case to the district court with instructions that it proceed to trial on the merits.

The appellant also challenges the constitutional validity of the New York statute which provides for the compulsory fingerprinting and photography of state mental patients. Under section 34(9) of the Mental Hygiene Law the director of each state hospital is required within three days of admission to record the fingerprints and photograph every patient, whether admitted on a voluntary or involuntary basis. One copy of these is kept at the hospital and a second copy is filed with "any other state agency maintaining a fingerprint file."

The justification for this procedure offered by appellees is as follows:

> Fingerprinting and photography of those individuals committed to State mental hospitals may be seen as needed devices to aid in identification of patients, identification of former patients at State mental hospitals, and the possible discovery of prior criminal convictions (which might be necessary to uncover or aid in proper diagnosis and treatment).

Appellant contends that this procedure violates her Fourth Amendment right to privacy, her Fifth Amendment right to substantive and procedural due process, and her Fourteenth Amendment right to equal protection of the laws.

The result sought by appellant, however, is precluded by Judge Weinfeld's recent opinion in *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, *aff'd per curiam*, 425 F.2d 1074 (2d Cir. 1970), *cert. denied*, —— U.S. —— (1970). These plaintiffs were challenging the constitutionality of the New York statute requiring the finger-

printing of employees of member firms of all national security exchanges. Judge Weinfeld noted:

> Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality. Federal and state courts alike, in upholding fingerprinting requirements, have rejected any such view. Our Court of Appeals, almost forty years ago, in upholding the right of federal agents to take fingerprints after an arrest upon probable cause, even in the absence of statutory authority, observed, "Fingerprinting is used in numerous branches of business and of civil service, and is not in itself a badge of crime." 306 F. Supp. at 1007-1008.

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Appellant attempts to distinguish this case by arguing that "no stigma is ordinarily attached to employment by stock exchange firms [while] the case is quite the contrary with confinement in mental hospitals." Absent some specific illustrations, however, appellant's argument that adverse collateral consequences will follow is mere conjecture.

The case is reversed and remanded with direction that the district court proceed to trial.

MOORE, *Circuit Judge* (concurring in part and dissenting in part):

I concur only in the portion of the majority opinion which holds that the appellant's constitutional rights were not violated when she was fingerprinted and photographed at Central Islip State Hospital, pursuant to §34(9) of the Mental Hygiene Law of New York.

I dissent as to the court's determination that it should reverse the trial court's grant of defendants-appellees' motion for summary judgment and, in effect, granting summary judgment for the plaintiff. I dissent on two grounds: first, because whether or not plaintiff's free exercise rights were violated, there is no appropriate relief which may be granted and hence the appeal should have been dismissed, and second, because plaintiff has failed to demonstrate an unjustified denial of any constitutional right.

I.

There are three named defendants in this case. They are: Alan D. Miller, M.D., Commissioner of Mental Hygiene of the State of New York, Alexander Thomas, M.D., Director of the Psychiatric Division, Bellevue Hospital and Francis J. O'Neill, M.D., Director of Central Islip State Hospital. As to these three defendants, it is entirely clear that money damages are completely inappropriate since there is no showing whatever that they in any way condoned the administration of drugs to the plaintiff. It is not shown that any of them had any information whatever as to the beliefs held by Miss Winters, or for that matter the treatment being accorded to her. All the record shows is that she brought her objections to certain members of the staff of each hospital, presumably the defendants "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff." Assuming, as the majority finds, plaintiff's constitutional rights were violated, an action under §1983 might be justified against the particular individuals who, acting under color of state law, unjustifiably violated plaintiff's constitutional rights. *Monroe* v. *Pape*, 365 U.S. 167 (1961). The named defendants were not such persons. In

our recent decision in *Sostre* v. *McGinnis*, —— F.2d —— (February 24, 1971), we held that Paul D. McGinnis, Commissioner of Corrections of the State of New York, could not be held liable under §1983 for damages notwithstanding that he knew of the fact of Sostre's confinement in segregation since the record, while demonstrating that Warden Follette had (as the majority found) detained Sostre in segregation because of his legal actions against the Warden and because of his political beliefs, did not demonstrate that McGinnis had been informed of these underlying reasons for Sostre's confinement, although McGinnis did know of the fact of such confinement. As with McGinnis in *Sostre*, the named defendants herein were not shown to have been informed of the circumstances which led the majority herein to conclude that plaintiff's rights were violated. In fact not only was there no showing that these defendants were aware of the plaintiff's religious beliefs but also there was no showing that these defendants were in any way aware of the treatment afforded Miss Winters. 73

To whatever extent, if any, the doctrine of "command responsibility" survives in the area of military affairs, that doctrine can have no applicability to the chain of responsibility in the state executive branch.

None of the "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiffs" can be held by this court to be liable for damages since no such person or persons have been served.

Therefore, there is no basis for granting damages to anyone currently before this court. Furthermore, since Miss Winters is no longer under the control of any of the defendants, and there is no showing that she is likely to

be brought under such control, it is clear that injunctive relief is also not in order. Similarly, declarative relief is inappropriate since there is no existing controversy.

The majority concludes "that the appellant has stated a claim on which relief may be granted" and thus "remand[s] the case to the district court with instructions that it proceed to trial on the merits." Based on the foregoing analysis, and barring any new evidence indicating injunctive or declarative relief may be appropriate, the district court may well conclude that no relief whatever is appropriate. However, I believe that we should have made this determination on the record before us and dismissed the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants. In failing to make this determination, this Court has, in effect, issued declarative relief without a present controversy.

II

Furthermore, the majority in my judgment, is not correct in its conclusion that plaintiff was in any way unjustifiably denied her constitutional rights.

After asserting, in effect, that there is no basis here for finding Miss Winters to be possibly harmful to herself and others, the majority suggests that "it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her" and that "such a relationship may be created if and when a person is found *legally* incompetent," and not by a proceeding under §§72(1) or 78(1).

Does the majority mean by this that a person who is deemed to be potentially harmful to others could not, even in an emergency situation, be given appropriate drugs to

reduce the likelihood of such anti-social conduct in the absence of an adversary judicial determination of incompetence? In the face of danger to herself and others, must Bellevue's harried medical staff seek out a judge whenever the police present them with a person whose mental condition requires that she receive tranquilizers or other drugs to protect herself and others or do they mean that a person can be given drugs against his stated religious convictions in at least some circumstances where the patient has not been declared legally incompetent by judicial adversary determination?

I disagree in any event with the majority's implicit conclusion that, based on the record as it was before the court on the motion of defendants for summary judgment, the treating doctors were not justified in concluding that the medical treatment administered was not in the best interests of the patient and, on the contrary, would hold that this determination, being valid, justified the medical care given Miss Winters. The Millsian distinction between instances of harm to others and instances of harm solely to self, relied on by the majority, would seem rarely if ever to be relevant in actuality because others are affected by virtually any action which an individual takes or fails to take. Thus, while Miss Winters might not have been likely to perpetrate a violent attack on her fellow patients had she not received the tranquilizers here involved, the very conduct which led to her admission, if repeated in the ward, might well have been disruptive to the recovery of others in her ward, who themselves may have been suffering from psychological defects. Second, even if no one other than Miss Winters would have been directly aided by the treatment for the condition for which she was admitted, as Judge Travia pointed out in his opinion

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below, if mentally ill persons are not accorded proper treatment, their "condition may progressively worsen, and the patient may become a public burden and expense."[1]

More fundamentally, I believe that a §78(1) admission, as well as a two-physician admission under §72(1) constitutes a quasi-judicial determination under state law authorizing medical care of an individual notwithstanding her lack of consent thereto. The majority, while conceding that after a proper proceeding, such as New York's procedure for the adjudication of incompetence, it "may" be permissible for the state to administer involuntary medical care notwithstanding the religious view of the patient on a *parens patriae* basis (presumably without having to demonstrate any likelihood that the patient is dangerous to others) suggests that the §§78 and 72 procedures are inadequate from a due process point of view to justify such a *parens patriae* role. However, regardless of the validity of such determination from a due process point of view, the staff of the two hospitals here involved should be entitled to rely on such quasi-judicial authorization. Furthermore, plaintiff has explicitly chosen not to challenge the constitutional validity of the procedures under §§78 and 72. The majority suggests, in effect, that even assuming the validity of these determinations under §§78 and 72, their effect must, as a constitutional matter, be diminished so as not to provide for forced medical treatment in cases of religious objection because New York has chosen

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1 The effects on others thus pointed out are at least as significant as the effects involved in similar cases in the past. *Pierce* v. *Massachusetts*, 321 U.S. 158 (1944) [economic effect on others of giving jobs to the few minors with real religious objections to child labor laws probably minimal]; *Reynolds* v. *United States*, 98 U.S. 145 (1878) [speculative whether polygamous relationship harms children of such union; harm to society minimal where permission for such marriages conditioned on religious viewpoint].

to allow mentally ill persons undergoing involuntary medical care under these two sections to continue to exercise rights over property pending adjudication of "incompetence." With this conclusion I disagree.

That New York separates medical and legal aspects of the problem of mentally ill persons and provides for separate determinations in each area merely shows its enlightenment, since appropriate medical care hopefully might enable a person to continue to conduct his own affairs in other respects. The two-physician certificate procedure of §72(1) is subject to a judicial hearing. That procedure at least should meet the majority's concern that the patient be afforded an opportunity "to tell his side of the story." The §78(1) emergency admission procedure is not an adversary proceeding but obviously due process does not preclude preliminary relief in an emergency situation on an *ex parte* basis, including the right to administer involuntary medical treatment.[2]

In my view, Judge Travia has in a well-reasoned opinion based upon a sound analysis of the law and the facts reached reached the correct decision and, accordingly, I would affirm the order of the district court. I would also dismiss the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants.

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2 As noted, the admission procedures here involved are specifically not challenged by the appellant. Furthermore, §78 has been amended since the time of the hospitalization of Miss Winters.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

495 F.2d 839
(2d Cir. 1974).

No. 883 - September Term, 1973

(Argued February 13, 1974 Decided April 1, 1974.)

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Petitioner,

v.

HON. ANTHONY J. TRAVIA, United States District Judge,

Respondent.

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Petitioner,

v.

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to petitioner,

Respondents.

Before:

Anderson, Mansfield and Oakes,

Circuit Judges.

Petition for a writ of mandamus or prohibition, 28 U.S.C. §1651(a), against the United States District Court for the Eastern District of New York, Anthony J. Travia, Judge.

Petition granted, order below vacated and cause remanded for proceedings consistent with this opinion.

JONATHAN A. WEISS, New York, N.Y. (Bruce J. Ennis, New York Civil Liberties Union, New York, N.Y., on the brief), for Petitioner.

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JOEL H. SACHS, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel), for Respondents Miller and O'Neill.

PER CURIAM:

This petition for a writ of mandamus or prohibition, 28 U.S.C. §1651(a), was brought by the plaintiff in a civil rights action to recover damages allegedly sustained as a result of forced medication administered her in 1968 in violation of her first amendment right to freedom of reli-

gion.[1] The trial court, in an oral ruling from the bench on January 11, 1974, later confirmed in an order signed January 22, 1974, ordered a physical and mental examination of plaintiff to take place at Brooklyn State Hospital and stayed all further proceedings until the results of the test. She likewise objects to this examination on religious grounds, and points out that her "physical condition is not and has never been involved in this case." Beyond this, on oral argument before us plaintiff's counsel was willing to and did represent and agree that the only present mental problem of plaintiff allegedly caused by the 1968 forced medication is "an unpleasant memory," this memory going to show the severity of the past suffering. Thus plaintiff is willing to abandon any claim that any present or anticipated physical or mental | disability or condition was caused by the | 841
1968 treatment on which her case is based.[2] Under these circumstances we do not see what purpose could be served by a Rule 35 examination which under its own terms may be ordered only "[w]hen the mental or physical condition ... of a

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[1] Plaintiff complained as a practicing Christian Scientist who was given medication consisting primarily of tranquilizers while an involuntary patient at Bellevue Hospital Center and Central Islip State Hospital. Her complaint was held to state a cause of action in Winters v. Miller, 446 F. 2d 65 (2d Cir.), cert. denied, 404 U.S. 984 (1971). See generally Dubnoff v. Goldstein, 385 F.2d 717 (2d Cir. 1971).

[2] Consequently, our grant of this petition is conditioned on that being the case.

party ... is in controversy...." Moreover, while the underlying constitutionality of Rule 35 is not in question, as it was in Sibbach v. Wilson & Co., 312 U.S. 1(1941)(5-4 decision), and Schlagenhauf v. Holder, 379 U.S. 104, 114(1964), and while Rule 35 is not limited in application to actions for personal injuries, Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940); but cf. Wadlow v. Humberd, 27 F.Supp. 210 (W.D. Mo. 1939), the required showing of "good cause" for the examination and that the condition of the party be "in controversy" are not mere formalities. Schlagenhauf v. Holder, 379 U.S. at 118. This case is like Coca-Cola Bottling Co. v. Torres, 255 F.2d 149, 153 (1st Cir. 1958), where, in a suit for damages for injuries sustained by drinking from a bottle containing the proverbial putrefied mouse, the court upheld denial of a physical examination on the basis that the plaintiff was not seeking damages for any present suffering but only for past physical injury and emotional disturbance, the remembrance of the bad taste going only toward showing the severity of that plaintiff's past suffering. Mandamus lies here to correct an abuse of discretion in ordering the examination, Schlagenhauf v. Holder, 379 U.S. at 110, under the "special" circumstances of this case.[3)]

[3)] As a Christian Scientist plaintiff had registered her objection to the initial physical examination given her

It is true that petitioner here sought a protective order against the taking of her deposition because of the mental anguish it would allegedly cause. This does not, however, by itself place her mental condition in controversy; whether the court will grant or deny the protective order (seeking primarily to have her deposition taken by written interrogatories) has not yet been determined and is not, therefore, a consideration presently before this court.

Petitioner also argues that the case should be transferred to a district judge other than the one who dismissed her claim in the first instance. Even though Rule 34 of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York provides for conduct of proceedings by the original judge if the proceedings do not require the trial of an issue of fact, we are reluctant to read it as per se disqualifying the judge in cases where there is an issue of fact to be tried, and we are reluctant to exercise our undoubted power for transfer except under the most compelling circumstances. See Meetings & Expositions, Inc. v. Tandy Corp., No. 73-2571 (2d Cir. Jan. 9, 1974), slip op. 1283; Taylor v. United States,

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at Bellevue Hospital, as the now reversed judgment dismissing the complaint in the first instance discloses, 306 F.Supp. 1158, 1160 (E.D.N.Y. 1969). Were she forced now to undergo a physical and mental examination to prove her claim, the court would be requiring of her some of the same treatment which was the reason for her suit in the first instance.

487 F.2d 307 (2d Cir. 1973). Here the judge was requested to transfer the case to another judge and, petitioner's counsel's affidavit alleges, the judge granted the motion for a physical and mental examination without "bothering" to read the arguments and authorities in a brief submitted apparently the day before the hearing.* If this indeed took place, and without reason or justification, such judicial conduct is the very kind of thing that calls to mind Farrer Herschell's well-known retort at the Bar when Sir George Jessel attempted to cut him short in argument: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." 2 J. Atlay, Victorian Chancellors 460 (1908). On remand, doubtless, the district judge will give very serious consideration to whether transfer would not serve the appearance of justice and thereby help assure its existence. 842

Petition for mandamus granted and cause remanded for proceedings consistent herewith.

MANFIELD, Circuit Judge (Concurring and Dissenting):

I concur in the denial of transfer of this case to another district judge. However, I would go further and hold that there was no abuse of discretion or usurpation of power

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*The Assistant Attorney General asserts that although respondent's motion papers and accompanying memorandum were served on December 14, 1973, petitioner did not serve her reply until January 11, 1974, the day of oral argument, which is con-

on the part of the district court warranting issuance of the extraordinary remedy of mandamus at all. On the contrary his order granting an examination of petitioner pursuant to Rule 35, F.R.Civ.P., was supported by a showing of good cause and well within his discretionary powers. Petitioner's "constitutional" claim to be relieved of such an examination is nothing more than a smokescreen which has the effect of obstructing justice and denying respondents the fair trial to which they are entitled under the Federal Rules of Civil Procedure.

Petitioner's complaint alleges that the medication wrongfully forced upon her by respondents has "caused me great emotional stress and anguish, pain and suffering, indignity and humiliation," and "caused me to become physically ill," for all of which she seeks $50,000 damages. In an affidavit sworn to as recently as November 27, 1973, she further states under oath that "the pain inflicted on me by the doctors in the hospital caused me a great deal of mental anguish ... also this case has made me undergo a great deal of suffering." These allegations are denied by the respondents. Thus plaintiff's mental and physical condition is clearly in controversy.

Petitioner having thus put her mental and physical health squarely in controversy, it seems to me to be elementary that "good cause" exists within the meaning of Rule

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firmed by the court file, and that Judge Travia, after hearing argument informed the parties that on the basis of his own thorough independent research he was satisfied that the motion should be granted. Apparently, however, no record of the oral argument or the court's comments in reference thereto was made for reasons unbeknownst to us.

35, F.R.Civ.P., for the conduct of a physical and mental examination of petitioner for the purpose of determining whether she has suffered any of the physical and mental injuries alleged and, if so, whether they are attributable to the alleged forced medication or to some other causes. As the Supreme Court said in the celebrated case of Schlagenhauf v. Holder, 379 U.S. 104, 119:

> "A plaintiff in a negligence action who asserts mental or physical injury, cf. Sibbach v. Wilson & Co., supra, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action. See Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121. See also Roberts v. Roberts, 198 Md. 299, 82 A.2d 120; Discovery as to Mental Condition Before Trial, 18 J.Am.Jud.Soc. 47 (1934)."

I find it rather extraordinary that the court does not adhere to the foregoing elementary principle, much less that it grants the extraordinary relief of mandamus. It is the petitioner, not the respondents, who initiated this lawsuit and who seeks damages. While it may offend her religious principles as a Christian Scientist to submit to physical or mental examination, to deny the examination would

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violate respondents' right to a fair trial. Under such circumstances petitioner, by seeking relief, waives the right she might otherwise have had to refuse an examination, whether or not that right be labelled "constitutional" because it stems from her religious beliefs. She must abide by basic principles of justice as articulated in the Federal Rules of Civil Procedure.

The holdings of Schlagenhauf v. Holder, supra, and Coca-Cola Bottling Co. v. Torres, 255 F.2d 149 (1st Cir. 1958), are not to the contrary and are perfectly consistent with the requirement that petitioner submit to examination in the present case. In Schlagenhauf a Rule 35 examination was denied on the ground that Schlagenhauf had "not affirmatively put into issue his own mental or physical condition." After stating (see supra) that an examination would be mandated in the case of a plaintiff who claimed mental or physical injury, the court continued as follows:

> "Here, however, Schlagenhauf did not assert his mental or physical condition either in support of or in defense of a claim. His condition was sought to be placed in issue by other parties. Thus, under the principles discussed above, Rule 35 required that these parties make an affirmative showing that petitioner's mental or physical condition was in controversy and that there was good cause for the examinations requested. This, the record plainly shows, they failed to do."

In Coca-Cola Bottling Co., after a non-jury trial the court of appeals properly refused to disturb the trial judge's exercise of his broad discretion in denying a Rule 35 examination as lacking a sufficient showing of good cause where the plaintiff had affirmatively asserted that he had fully recovered from his injuries and was not claiming any damage for his present physical condition. Here, on the other hand, plaintiff is claiming mental and physical injuries as a result of the medication and the court has interfered -- in my view without warrant -- with the trial judge's exercise of his broad discretion.

It is true that upon oral argument petitioner's counsel indicated that she might be willing to withdraw her claim for present physical and mental injury (except for the "unpleasant memory" of her earlier enforced medication). However, he advised that he would first have to consult with his client and obtain authority from her before waiving any such claim. Since the argument no such waiver has been furnished and, as far as the record is concerned, petitioner is still claiming both present and past mental and physical suffering.

Even assuming that such a waiver of present physical or mental suffering were forthcoming it would not justify our interference with the district judge's exercise of his

discretion to order an examination pursuant to Rule 35.[1] If petitioner continued to assert a claim for past mental and physical injury, which presumably would cover the period up to the day before the waiver, a physical and mental examination, far from being useless or meaningless, might shed light on the validity of her claim and the nature and extent of any injuries sustained by her in the past. We have frequently, in other contexts, admitted into evidence expert medical opinion, based on the results of a recent examination, for the purpose of determining past mental and physical condition.[2] Examination by a psychiatrist, for instance, might reveal that petitioner's mental condition had pre-dated her enforced medication and that the treatment served to alleviate rather aggravate that condition.

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[1] The examinations of petitioner conducted during the period of her alleged involuntary hospitalization in 1968, while relevant, are hardly sufficient, standing alone, to determine whether she has suffered any mental or physical injuries during the past first years as a result of that hospitalization.

[2] Evidence of subsequent condition is relevant circumstantial evidence of a condition at a prior time. J. Wigmore §§190, 225 (3d ed. 1940). For instance, earlier mental condition may be evidenced by proof of mental condition at a later time, Hoisington v. United States, 127 F.2d 476 (2d Cir. 1942); Hart v. United States, 130 F.2d 456 (D.C. Cir. 1942); In re Ring's Estate, 237 Ia. 953, 22 N.W. 2d 777; and evidence of present physical condition is relevant in determining physical condition at an earlier time. American Auto Rim Lock Corp. v. Cleveland Welding Co., 27 F.Supp. 559 (S.D.N.Y. 1939); Bankers Trust Co. v. Higgins, 65 F.Supp. 836 (S.D.N.Y. 1946).

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For the foregoing reasons the trial judge's order granting a physical and mental examination of the plaintiff was well within his broad discretion and, in my view, this court's interference with his exercise of that discretion represents an unwarranted and mischievous use of mandamus power.

517 F.2d 1337
(2d Cir. 1975).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 949—September Term, 1974.

(Argued June 2, 1975 Decided June 6, 1975.)

Docket No. 75-7121

MIRIAM WINTERS,

Plaintiff-Appellant,

v.

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DA CORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
SMITH and MESKILL, *Circuit Judges.*

Appeal from the order of the United States District Court for the Eastern District of New York, Orrin G. Judd,

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Judge, denying as to three of various named defendants plaintiff's motion, Fed. R. Civ. P. 60(b), to reopen default judgment entered for all defendants in civil rights action after decision by Court of Appeals reversing dismissal for failure to state a claim for relief and remanding for trial of claim against all defendants.

Reversed and remanded.

PHILIP M. GASSEL (Legal Services for the Elderly Poor, New York, N.Y., Jonathan A. Weiss, New York, N.Y., of counsel) and Bruce Ennis (New York Civil Liberties Union, New York, N.Y.) of counsel, *for Appellant.*

STANLEY L. KANTOR, Asst. Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for State Defendants-Appellees.*

ELLEN KRAMER SAWYER (W. Bernard Richland, Corporation Counsel, L. Kevin Sheridan, of counsel), *for Defendants-Appellees Thomas and Ollins.*

PER CURIAM:

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Miriam Winters appeals from the order of Judge Orrin G. Judd of the Eastern District of New York denying as to three defendants but granting as to others her motion under Fed. R. Civ. P. 60(b)[1] to reinstate her civil rights

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1 On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

action, 42 U.S.C. §1983, 28 U.S.C. §1343, dismissed for her failure to appear for trial at the scheduled time. The dismissal followed an order of this court reinstating the plaintiff's complaint for trial on the merits on an appeal from the district court's dismissal of the suit for failure to state a claim upon which relief may be granted. *Wilwerding* v. *Miller*, 446 F.2d 65 (2d Cir. 1971). Since we conclude that under the latter decision Judge Judd was deprived of discretion to reinstate the action as to less than all the defendants if he chose to reinstate it as to any, we reverse his denial of relief as to three of the defendants and remand for trial of plaintiff's claims against them as well.[2]

This suit has its origins in appellant's involuntary confinement in May, 1968, for psychiatric care in New York City's Bellevue Hospital and Central Islip State Hospital. Despite her repeated insistence that, as a Christian Scientist, it violated her religion to take medication, the hospitals' staffs forced her to do so. She then initiated the instant damages action for violation of her First Amendment rights against the Commissioner of Mental Hygiene of the State of New York, Bellevue Hospital's Director of the Psychiatric Division, Central Islip State Hospital's Director, and various named and unnamed doctors on the staffs of the two hospitals. The case was dismissed by the district court, Anthony B. Travia, *Judge*, on defendants' motion for summary judgment. After this court's reversal of Judge Travia, the case was prior to trial transferred to Judge Judd. At a pretrial conference on June 5, 1974, Judge Judd set November 4, 1974, as the date for trial. In the interim, some difficulties arose in transcribing depositions in time for the scheduled trial date. Counsel for appellant, not having received to date a copy of his client's deposition transcript, telephoned Judge Judd's

2 All claims against Dr. Thomas have been withdrawn.

chambers on October 22, 1974, and informed the judge's law clerk of the problem. In telephone calls of October 29, October 31, and November 1, appellant's counsel told the clerk that the problem had still not been resolved and that he foresaw that the case could not proceed to trial without the depositions. According to an affidavit submitted by counsel to the court in support of the motion to reopen, this final conversation with Judge Judd's clerk left him with the firm impression that the trial would not begin as scheduled but rather would shortly be rescheduled to accommodate the practical difficulties delaying transcription of the depositions.[3] He conveyed his understanding to counsel for defendants from the state attorney general's office and the city corporation counsel's office. Along with counsel from the state, plaintiff's lawyer failed to appear in court at the scheduled time. Judge Judd dismissed the suit but, after hearing the latter's explanation later that day for his failure to appear, invited counsel to move to reopen. Counsel so moved and on December 13, 1974, Judge Judd ordered, with no explanation of his basis for distinguishing among the defendants, that the case be reinstated except as to three of the defendants.[4]

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The court's order obviously represents an attempt to weed out three defendants against whom Ms. Winters' claim seemed insubstantial. The district court may have implicitly applied a theory of official immunity. Such a theory necessarily required, however, exploration in light of the facts developed at trial. For in 1971 this court plainly held that the suit should go to trial as to all the defendants and therefore left no room for the dis-

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3 Affidavit of Jonathan A. Weiss, Joint Appendix at 7A.

4 These three defendants, Alan D. Miller, Alexander Thomas and Gerald Ollins are, respectively, Commissioner of Mental Hygiene of the State of New York, Director of the Psychiatric Division of Bellevue Hospital, and a staff doctor at Bellevue Hospital.

trict court to distinguish among the defendants on the basis of the comparative merits of plaintiff's claims against them. With relation to the instant action, then, the defendants were similarly situated unless and until the proof at trial provided a basis for distinction or, as has not been claimed, supervening federal law created such a basis. See 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶0.404 [10] (2d ed. 1974). Assuming that Judge Judd would have acted within his discretion in refusing to reopen the action altogether—an issue which we need not decide—this court's order need not have been actually implemented. Judge Judd's reinstatement of the claim as to some but not all of the defendants did more than simply not implement our prior order: it rejected it. Having decided that justice required granting the requested 60(b) relief, the district court remained bound, under the law of the case, by this court's prior prescription to proceed to a trial on the merits as to all the defendants.

The order of the district court must therefore be reversed insofar as it failed to grant the requested relief as to three defendants. The court is directed to reinstate the action as to defendants Miller and Ollins and proceed to trial. Plaintiff has withdrawn her claims against Thomas, the third defendant against whom the 60(b) relief was denied; the latter is therefore not made subject to this order.

Reversed and remanded.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff,

- against -

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to plaintiff,

Defendants.

69-C-783

December 16, 1975

Appearances:

BRUCE J. ENNIS, ESQ.
New York Civil Liberties Union
and
JONATHAN A. WEISS, ESQ.
PHILIP M. GASSEL, ESQ.
Legal Services for the Elderly Poor

Attorneys for Plaintiff

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants Miller, O'Neill, DaCorta and Dromgoole

By: STANLEY L. KANTOR, ESQ.
Assistant Attorney General
of Counsel

Appearances (continued):

HON. W. BERNARD RICHLAND
Corporation Counsel of the City of New York
Attorney for Defendants Blankfeld and
Ollins

By: GEORGE A. WEILER, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

Plaintiff's motion to set aside the verdict in this case and for a new trial, pursuant to F.R.C.P. 59(a), lists eighteen separate grounds.

Facts

This civil rights action seeks damages for the administration of medication in city and state hospitals in alleged violation of the plaintiff's religious objections and rights, as one who believed in Christian Science. The case has been to the Court of Appeals three times: 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 985, 92 S.Ct. 450 (1971), reversing Judge Travia's order, 306 F. Supp. 1158 (E.D.N.Y. 1969), which granted summary judgment for the defendants who were named in the original complaint; sub nom., Winters v. Travia, 495 F.2d 839 (2d Cir. 1974), reversing Judge Travia's order which directed plaintiff to submit to physical and psychiatric examiantions; and 517 F.2d 1337 (2d Cir. 1975), reversing Judge Judd's order which refused to reopen the case

as to defendants Miller and Ollins. All these decisions were prior to any trial. Therefore, in order to examine plaintiff's grounds to set aside the verdict in context, it is necessary to state the basic facts as they actually developed at the trial.

The original complaint in this action was filed in July 1969. Most of the defendants were not named by the plaintiff or served until January 1974. The parties were not deposed until September 1974.

On the argument of the second proceeding in the Court of Appeals, the plaintiff's counsel agreed, as a condition of relieving her from the requirement of physical and psychiatric examinations, that no damages would be claimed for any physical disability or mental disturbance arising from the defendants' alleged acts.

The concrete case presented by the evidence is different from the somewhat abstract issues which have heretofore been presented to the courts.

Plaintiff was taken in a police ambulance to Bellevue Hospital on May 2, 1968, after she had been involved in a noisy dispute with the manager of the King Edward Hotel in Manhattan. The argument concerned change of accommodations requested by the management and approved by the case worker of the Welfare Department, which supported her financially. When the police came to her room, she refused to open the

door to let them in. They had to break down the door and remove her in a strait jacket. No action was brought against the police, the City or the hotel management.

Plaintiff's condition upon arrival at Bellevue Hospital was described by Dr. Blankfeld, who was on duty in the Emergency Room that night, as "Evasive, guarded, suspicious, negative," with her speech "Pressured, L.O.A., tangential, irrelevant, illogical," and her judgment and insight "Nil." She spent eleven days at Bellevue Hospital and about two months at Central Islip State Hospital. Plaintiff consented to her transfer from Bellevue to Central Islip although she was informed of her right to go before a judge. She signed an acceptance of voluntary status during the course of her stay at Central Islip. She was discharged as improved on July 18th. During her hospitalization plaintiff was attended by some sixteen doctors, of whom only seven have been sued, and only six were served. Plaintiff's counsel stated at the beginning of his opening that there would be no challenge to the legality of plaintiff's hospitalization.

Plaintiff's personality was not one likely to appeal to a jury. She did not attend any part of the five-day trial except for the few hours she was on the stand as a witness. Her father was a doctor. She had never worked, and was supported by welfare payments after she had spent her inheritance. Her demeanor on the stand was combative and argumentative.

As a representative of Christian Science, she was not the best. She had called for a doctor a month or so before the incident, explaining that this was necessary in order to persuade the Welfare Department that she was entitled to a room with a private bath at the Hotel Pierrepont in Brooklyn. A Christian Science practitioner spoke to her at Bellevue and one visited her at Central Islip as well, but neither of them was called as a witness, and there is no evidence that either of them complained about her being medicated. Plaintiff did, however, refuse, on Christian Science grounds, a proffered dental examination while at Central Islip. The examination was not given. She went to Long Island College Hospital shortly after her release from Central Islip, with her Christian Science practitioner's approval, because she said she had a terrible breathing problem. She took medicine once or twice a day after it was prescribed at Long Island College Hospital, although she testified that the medicine didn't help. The Bellevue records show that she had a vaccination mark on her left arm. Although she asserted that these notations were a lie, she did not raise her sleeve in order to demonstrate whether there was a vaccination mark.

No member of the Church of Christ Scientist was called to describe the practice of the church with respect to medicine. A psychiatrist witness for the plaintiff, who had

read Mary Baker Eddy's books, and had taken a course in Christian Science methods of healing at Union Theological Seminary, stated that the general tenets of the sect were that medication is silly, and that illness does not exist, or constitutes error, but that interpretation is left to the individual. Apparently there are many patterns of belief on the subject.

Most of plaintiff's witnesses dealt with the psychological effects of undesired medical treatment. They asserted that such treatment would create hostility that would be adverse to the optimum patient-doctor relationship. No claim of medical malpractice was involved, however. The plaintiff was diagnosed at Bellevue as suffering from a schizophrenic reaction, paranoid type. Although plaintiff's witnesses stated that there were alternatives to medication for such a condition, the evidence was clear that thorazine, one of the principal drugs administered to plaintiff, was generally recognized in 1968 as an acceptable, and even preferred, treatment for schizophrenics.

In the nature of a civil rights action, liability is personal. Of all the doctors whose names appear on the medical charts, Dr. Christine Jordan at Central Islip administered more medication than anyone else. She was not served although named as a defendant. She now resides in Germany, but might be subject to long arm jurisdiction.

Dr. Blankfeld, who was in the Emergency Room at Bellevue on May 2, 1968, was the first doctor to see the plaintiff. He did not perform the usual physical examination because she objected on the basis of her Christian Science beliefs. He noted that she "looks well." He noted, as described above, that she was "Evasive, guarded, suspicious . . . irrelevant, illogical," with no judgment or insight. He directed that she be sent to the female disturbed ward and given thorazine intramuscularly at once and oral doses thereafter. He was not present when the intramuscular dosage was given, by injection forcibly in her buttocks. Dr. Blankfeld testified at the trial that he had no recollection of the plaintiff's case, but that his notes indicated that she appeared to be severely mentally ill. It was his professional opinion that refusal to treat her would have been improper, and that the medication he prescribed was in her best interest.

The name of Dr. Ollins, another Bellevue doctor, did not appear on the medical order sheet. The plaintiff based his liability on the fact that he was one of the two doctors who signed the transfer order and that he must have known at the time that she was a Christian Scientist who had objected to medication.

Doctors Grant and Kosovic of Bellevue defaulted in answering. Plaintiff testified that she thought a nurse named Grant had given her an injection. Dr. Grant was in fact

a medical resident, and appeared on the order sheet for May 7, 1968 as having prescribed 100 mg of thorazine, an increase over the 50 mg previously prescribed by Dr. Kosovic. Dr. Kosovic had found that she was paranoid, that "Her affect was inappropriate," and that she was not able to take care of herself and needed hospitalization.

Dr. Dromgoole is the only defendant still working in the same hospital. She was a psychiatric resident in 1968 and is now a staff psychiatrist at Central Islip Hospital. She attended most of the trial. The plaintiff testified that she recognized her and must have told her that she objected to being given medication. Dr. Dromgoole's name was not on the doctors' order sheets. She testified that the plaintiff was not her patient, and that she was not responsible for Dr. Jordan, who prescribed most of the medication administered at Central Islip. Dr. Dromgoole's only real connection with the case was that she was on the committee that passed on plaintiff's discharge, and directed that she be given a one week supply of Mellaril (which she said she threw away). Her note of July 17, 1968 stated, "She is a Christian Scientist. However, she takes her medication and is no problem at ward adjustment . . . Mental condition: Much improved."

Dr. DaCorta was a supervising psychiatrist, one of Dr. Jordan's superiors. He approved plaintiff's voluntary status on June 18, and made a diagnosis of schizophrenic

paranoid type on June 27th. From these facts the jury could have inferred that he had read her record and knew that she was a Christian Scientist, and that medication had been prescribed. The Central Islip chart reflects only one objection to medication, a note of Dr. Jordan's on May 29, 1968.

Dr. O'Neill is sued as Director of Central Islip State Hospital. The complaint contains no specific charge against him other than the general statement that "Each of the defendants, at all times relevant herein, was acting under color of a statute, ordinance, regulation, custom, or usage of the State of New York."

The unarticulated theory of the complaint appears to be that he should have exercised his power as administrator to announce a regulation forbidding the administration of medication to patients who voiced religious objections to such treatment. Plaintiff was one of 8,000 persons in the hospital. Dr. O'Neill had no personal recollection of her, or of any specific Christian Scientist among the patients. He permitted Christian Science practitioners to visit the hospital and to hold services. During the twenty-two years that he was director of the hospital, he had heard no objection to the administration of drugs to Christian Science patients, until the complaint in this action was served on him. Representatives of Christian Science groups met with him from time to time. Their discussion related primarily to

the conduct of religious services and means of making such services known to Christian Scientists among the patients. No Christian Science representative had voiced any objection to medication.

Dr. Miller, as Commissioner of Mental Hygiene at the time of plaintiff's hospitalization, administered institutions with 110,000 patients. He had never been informed of any issue concerning objections to medication by Christian Scientists. Neither the American Psychiatric Association nor the National Institute of Mental Health had any regulations on the subject. During his administration, he had drafted regulations on the rights of a patient. During the long development of these regulations in the bureaucratic hierarchy, no one had suggested any statement concerning religion, before the complaint in this case was served. The regulations, as promulgated in 1975 by the new Commissioner, now specify that doctors should honor religious objections to medication, but the court refused to let the jury consider these facts in connection with the 1968 incident.

The claim against Dr. Thomas as Director of the Psychiatric Division at Bellevue, was withdrawn by plaintiff at the time of the third Court of Appeals decision, when it appeared that he had not been Director at the time of the incident.

Although the city defendants (the Bellevue doctors)

With respect to defendants Grant and Kosovic, the jury's determination to treat them in the same way as the other defendants is understandable. A lawyer realizes that a defaulting defendant must pay even though the other defendants won their cases, and that evidence of good faith may not be considered in their favor, but such a result might well seem illogical and unfair to a jury of laymen. The jury may also have been confused by the fact that the verdict form gave them an opportunity to decide for these defendants as well as to allow damages against them.

Plaintiff, in asking that the jury fix the damages against the defaulting defendants, may have taken the risk that they would find that the plaintiff in fact suffered no damage. Nevertheless it appears fair in this case to give plaintiff some relief against the verdict.

There is no occasion for granting a new trial, since the court has heard all the testimony and it has power to make new findings and conclusions under F.R.Civ.P. 59(a)(2). The defaulting defendants did not ask for a jury verdict, and therefore are not prejudiced by the court's deciding now to take the issue of damages away from the jury. Plaintiff is not prejudiced, since she had no right to a jury on the issue.

On the basis of the evidence, and particularly the doctors' notes in the Bellevue Hospital report, the court finds that defendant Grant is liable in the sum of $300.00 and defendant Kosovic in the sum of $500.00

Setting aside the verdict for the defendants Grant and Kosovic is no justification for granting a complete new trial. In Rivera v. Farrell Lines, Inc., 474 F.2d 255 (2d Cir.), cert. denied, 419 U.S. 851, 94 S.Ct. 122 (1973), which the plaintiff cites, the court found error in the charge concerning contributory negligence and directed a trial on all issues, since it could not determine the extent to which the finding of contributory negligence affected the verdict. Since the defendants' liability here was individual, error with respect to defendants Grant and Kosovic would not affect the rest of the verdict.

2. Plaintiff complains that the court did not use the word "presumption" in mentioning the irrelevance of commitment to a mental hospital. The use of a technical word like presumption, which legal scholars have difficulty in defining, would not have been helpful in giving instructions to a lay jury. The court said in its charge (p. 7) that

> [T]he law in New York is that a finding of a mental illness, even by a Judge and a Jury and commitment to a hospital doesn't prove that the patient is incompetent or unable to manage herself or her affairs.

And continued that

> A person not found to be incompetent by a judge or jury has a constitutional right on religious grounds to refuse to take drugs that are not necessary to save that patient's life. . . .

This was as favorable an instruction as plaintiff could

properly ask, and in any case, except for the verbal charge from "raise a presumption" to "prove," was all that the plaintiff asked.

3. Plaintiff complains of the court's refusal to adopt verbatim nine of its sixty-eight requested instructions. The words which the court used were a suitable paraphrase of portions of the language of the Supreme Court in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975) and O'Connor v. Donaldson, 422 U.S. , 95 S.Ct. 2486 (1975). The Supreme Court opinions were not designed to formulate instructions to a lay jury. There is no requirement that the court repeat them verbatim in full. The issue was properly stated at page 10 of the charge as whether

> . . . the defendants reasonably believed in good faith, that his or her actions, conducts or omissions didn't violate what she or he should have reasonably known to be a clearly established constitutional right. . . .

4. Plaintiff objects to a reference by the court during the voir dire of jurors to the fact that the defendants were individually liable rather than the city or the state. No suggestion is made that the city would reimburse the Bellevue doctors if they were held liable, even though it did supply free counsel. The provision in the New York Public Officers Law § 17 concerning state employees was not in effect when the acts in question were performed, and therefore does not apply. See L.1971, c.1104, § 3; Public Officers Law

§ 17 note p. 29 (McKinney's Supp. 1975 - 76).

In any event, the Public Officers Law does not apply to a "willful and wrongful act," such as plaintiff here alleged.

5. Plaintiff complains of the court's refusal to use six of her twenty-four proposed voir dire questions. The court dealt on voir dire with the prospective jurors' knowledge of the parties, their prior jury service, their employment, the employment of any family members by the city, the state, any mental hospital, or any psychiatrist, their participation in any litigation with the city or the state, their experience with Bellevue or Central Islip or any other mental institution, their willingness to follow instructions concerning the right to refuse hospitalization or treatment, their affiliations with Christian Science, whether they were very religious, moderately religious, or not religious, and where they resided. There was no need to probe the other specific matters which plaintiff requested.

6. The direction of a verdict for defendant O'Neill was not forbidden by the Court of Appeals' first decision sustaining the complaint against him. What the Court of Appeals said was that there should be a "trial on the merits." 446 F.2d 65, 71. The facts produced at trial, as outlined above, show no basis for any finding of personal responsibility of Dr. O'Neill for the medication of which plaintiff complains.

The court's granting the defendant O'Neill's motion for a directed verdict, pursuant to F.R.C.P. Rule 50(a), was in accord with the often-articulated standard that

> a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion.

5A Moore's Federal Practice ¶ 50.02[1], p. 2320 (1975).

7. Plaintiff complains of the court's statement (p. 13) that

> [U]ntil 1971 no court in this state had ruled on the First Amendment right to free exercise of religion, that a Christian Scientist who is legally admitted to a mental hospital had a constitutional right to refuse proper medication.

This statement was factually correct and was followed by a further statement that

> You may consider the importance of the First Amendment and the fact that it's been part of the Constitution for 200 years in determining whether the defendant should nevertheless have foreseen that such administration of drugs after a protest on Christian Science grounds was a violation of constitutional rights.

The charge as given did not prejudice the plaintiff.

8. Plaintiff complains that the court did not include the word "sincerely" in its description of the elements of good faith. The evidence was clear and undisputed that the defendant doctors were each acting in the sincere belief that the administration of thorazine was proper treatment for

the plaintiff. Even though the plaintiff's insistence on a particular word seemed inappropriate, the court inserted it in its final instructions to the jury when they asked for a repetition of the charge on good faith. The plaintiff was not prejudiced by the charge on this point.

9. Plaintiff contends that the defense of good faith should have been permitted only for those defendants who actually introduced some evidence on the subject. Evidence, however, is not restricted to a particular defendant. The copious testimony concerning the general recognition of thorazine as proper treatment for schizophrenia was available in support of claimed good faith with respect to all defendants. The hospital records, which were among the exhibits that the jury requested within five minutes after they began their deliberations, also contained comments on plaintiff's condition when she was admitted to Bellevue, which might have supported a good faith belief by any trained psychiatrist that she required treatment with thorazine. Moreover, Dr. O'Neill testified that his examination of plaintiff's file showed no indication of malice or animus by any doctor.

10. Plaintiff has combined Objection 10 with Objection 9.

11. Plaintiff complains that instructions on the good faith defense were not sufficiently "balanced." The court stated specifically (p. 11) that

> The burden is on each defendant to prove each element of his good faith defense by a preponderance of the evidence.

Furthermore, the court properly instructed the jury on the circumstances under which the jury must rule against the defendants as well as circumstances compelling a verdict against the plaintiff (p. 12):

> [I]f you find a defendant violated the constitutional rights and that there is no evidence from which you can say the defendant acted in good faith or failed to carry the burden of good faith, then you should enter a verdict for the plaintiff against that defendant. If you find a defendant didn't violate plaintiff's constitutional rights or if she acted in good faith as I have defined [it,] then you should enter a verdict for that defendant.

12. Plaintiff attacks the instructions about defendant Dromgoole as a supervisor. The court said (pp. 9-10) that

> . . . [L]iability has to be founded on personal grounds. You can't hold one person liable for what somebody else did unless there was a failure of actual duty of supervision.

and (pp. 24-25)

> You can't charge any of the defendants for any acts which were done by the other doctors unless those doctors were under the direct supervision of one of the defendants here.

Under the facts concerning Dr. Dromgoole's action in the case, there is no substance to this objection.

13. Plaintiff next criticizes the court's charac-

terization of the evidence, particularly the statement that holding defendant Miller liable the basis of the evidence would constitute a "strict standard." This was certainly true, in the light of his never having received a complaint from anyone that Christian Scientists in any mental hospital objected to the administration of suitable drugs to improve their conditions.

14. The "miscellaneous closing remarks" to which the plaintiff objects require no comment.

15. Plaintiff also objects to statements by defense counsel as incorrect or erroneous. The jury were instructed (pp. 2, 26) that their recollection of the evidence governed, whatever counsel or the court might say. No further comment was required by the court.

16. The plaintiff objects to the exclusion of evidence of a regulation adopted in 1975 concerning the administration of medication over religious objections. This did not contradict the statements in Dr. Kolb's book that thorazine was the preferred treatment for persons suffering from schizophrenia. In any event, under the "subsequent repairs" rule, Smyth v. Upjohn Co., F.2d (2d Cir. Dec. 2, 1975), the 1975 regulation was not admissible as bearing on the conduct of the individual defendants in 1968.

17. Plaintiff asserts that counsel should have been permitted to question Dr. Miller about the administrative

steps he took after the Court of Appeals decision in this case in 1971. Since the issue was the propriety of the defendants' actions in 1968, action in the 1970's was clearly irrelevant.

18. Finally, plaintiff objects that she should not have been required to prove that her constitutional rights were violated. What the Court of Appeals held on the first appeal was that the complaint stated a cause of action. Defendants' motion to dismiss the complaint was treated as a motion for summary judgment because it was accompanied with affidavits. However, the court's direction was that the district court "proceed to trial" - which clearly means that plaintiff must prove that in fact she did believe in Christian Science, that she objected on religious grounds to medication, and that particular defendants violated her rights, and defendants must have an opportunity to prove that they were acting in good faith.

Conclusion

The complaint asks for a declaratory judgment and an injunction against further violation of plaintiff's constitutional rights, and for damages. She has obtained a clear declaration of the law from the Court of Appeals. Her claim for damages against the doctors was less well founded on the facts than the legal point which she presented. Nothing would be gained by prolonging this litigation.

It is ORDERED that plaintiff's motion be granted to the extent of setting aside the verdict in favor of defendants Dusan Kosovic and Sandra Grant, and denied in all other respects; that the Clerk of Court enter judgment in favor of plaintiff against defendant Dusan Kosovic in the sum of $500.00 and in favor of plaintiff against defendant Sandra Grant in the sum of $300.00, with costs against each of them in respect of the issue of damages; and that the Clerk of Court enter judgment for the other defendants in accordance with the jury verdict.

U S D J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff,

- against -

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; et als,

Defendants.

- - - - - - - - - - - - - - - - - -x

No. 69-C-783

Memorandum of Decision and Order

March 1, 1977

APPEARANCES:

For Plaintiff:

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MISHLER, CH. J.

The plaintiff moves for an order granting her, inter alia, a new trial, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure.

This long-lived case is presently on appeal to the Court of Appeals for the Second Circuit from the denial of plaintiff's previous motion for a new trial. The notice of appeal was filed on January 3, 1976, and an order to proceed in forma pauperis on the appeal was entered on February 19, 1976. Since that time the plaintiff has been unable to obtain a complete set of transcripts. The unavailability of transcripts for portions of the trial is the basis of the instant motion.

Briefly stated, this action was brought pursuant to 42 U.S.C. §1983 by a follower of Mary Baker Eddy, Christian Scientist, who, after involuntary hospitalization, was administered medication despite her religious objections. The defendants are the Directors of Bellevue and Central Islip Hospitals, the Commissioner of Mental Hygiene of the State of New York, and staff doctors of Bellevue and Central Islip. The original complaint was dismissed for failure to state a claim upon which relief could be granted. Winters v. Miller, 306 F. Supp. 1158 (E.D.N.Y. 1969). That decision was reversed with the direction that the case be remanded and set for trial on the merits. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), cert. denied, 404 U.S. 985, 92 S.Ct. 450 (1971). Following lengthy pretrial proceedings, see Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) and Winters v. Miller, 517 F.2d 1337 (2d Cir. 1975), the case went to trial before the late Judge Orrin G. Judd. The trial,

held on July 23-31, 1975, resulted in jury verdicts in favor of all defendants. On December 16, 1975, Judge Judd denied post trial motions to set aside the verdicts and for a new trial. The notice of appeal was filed in January 1976.

By July 19, 1976, after some delays by the court reporters' office and three rescheduling orders from the Court of Appeals, the plaintiff was in possession of the transcripts of the trial testimony. The transcripts of the voir dire and pretrial bench conferences were promised first for August, then for September, and then November. In December 1976, the plaintiff was informed by Joseph Barbella, the Chief Court Reporter, and Emanuel Karr, also of the court reporters' office, that the general policy was not to record pretrial proceedings in civil cases.

Jurisdiction

The threshold question is whether, subsequent to the filing of a notice of appeal, a district court has the power to consider a motion for a new trial. The filing of a timely notice of appeal divests the district court of authority to proceed further with the case, except, inter alia, in aid of of the appeal or to correct clerical errors. Sykes v. United States, 392 F.2d 735, 738 (8th Cir. 1968); Lloyd v. Lawrence, 60 F.R.D. 116, 118 (S.D. Tex. 1973); 9 Moore's Federal Practice ¶203 11, at 734 (1975). In Herring v. Kennedy-Herring Hardware

Co., 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit devised a procedure for dealing with motions for new trials based on the appellant's inability to obtain a stenographic transcript, when such motions are made after filing a notice of appeal:

> The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), Rules of Civil Procedure, rests with the District Court, not the Court of Appeals. . . .[A]ppellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court. If, after a full and careful investigation of the problem, the District Judge is of the opinion that a fair and satisfactory record can be prepared for the purpose of a review of this case by the Court of Appeals, or if the failure to prepare such a record is due to the inexcusable neglect of the appellant to preserve his rights in the matter or to his failure or refusal to fully cooperate, he will so state and the pending motion for a remand will be overruled. If, without fault on the part of the appellant, or because of the failure of the appellee to fully cooperate in the matter, the District Judge is of the opinion that a record cannot be prepared and presented to the Court of Appeals which will fairly and satisfactorily enable the Court to review the judgment entered in this action and that the appellant should be granted a new trial, he will so certify to this Court and the pending motion for a remand will be sustained for action by the District Judge on the motion under consideration by him.

Id. at 203-04, citing Smith v. Pollin, 90 U.S. App. D.C. 178, 194 F.2d 349 (D.C. Cir. 1952). Accord, First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343, 345-46 (6th Cir. 1976); Hydramotive Mfg. Corp. v. SEC, 355 F.2d 179, 181 (10th Cir. 1966).

In this circuit, a similar procedure was adopted in Ryan v. United States Lines Co., 303 F.2d 430, 433-34 (2d Cir. 1962). See Harper Bros. v. Klaw, 272 F. 894, 895 (2d Cir.

1921) (pre-Federal Rules); Sampson v. Ampex Corp., 335 F. Supp. 242, 246 n. (S.D.N.Y. 1971) (dicta), aff'd, 463 F.2d 1042 (2d Cir. 1972); 9 Moore's Federal Practice ¶203.11, at nn. 6 & 10 (1974 and 1976 Supp). Thus, we have jurisdiction to deny the motion outright or to certify to the Court of Appeals that the record is inadequate for review and therefore a new trial will be ordered.

Inadequacy of the Record

The unavailable transcripts affect only three of the claimed errors on the appeal from the denial of the first motion for a new trial. First, the plaintiff argues that the court erred in refusing to ask certain questions of prospective jurors. This claim, however, hardly depends on a transcription of the voir dire since the unasked questions are available to the plaintiff. Second, the plaintiff challenges a ruling of the trial court in placing the burden of proof on the plaintiff. Again, this claim involves a legal issue that can be resolved without a record of the pretrial proceedings. Finally, the plaintiff argues on the appeal that the trial judge "displayed a general prejudice, hostility and antagonism toward the plaintiff . . . leaving the jury with the distinct impression that the Court considered Plaintiff's case to be weak or frivolous." Since a transcript of the trial itself is available, the plaintiff has a complete record of the trial judge's demeanor in front of the jury. We take judicial notice

of the late Judge Judd's reputation for fairness, impartiality and objectivity in the conduct of a trial.

In sum, in this case the inability "to obtain a stenographic transcript of the evidence is not, standing alone, sufficient to set aside a judgment and grant a new trial." Herring v. Kennedy-Herring Hardware Co., supra at 203. The motion for a new trial is denied[1], and it is

SO ORDERED.

U. S. D. J.

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[1] In the alternative, the plaintiff, joined by the defendants, requests an investigation of the handling of the record by the court reporters' office. Further investigation of the regrettable delay in the preparation of the transcripts would be fruitless. Much, if not all of the problems, are traceable to a Mr. Ira Rubinstein, who has since left the court reporters' office. Mr. Rubinstein, time and again, demonstrated irresponsibility and carelessness in the performance of his duties. The present situation is one more example. As to the absence of transcripts for the voir dire and pretrial bench conferences, I can confirm that, except in special circumstances, these proceedings are not recorded by the reporters.

MR. KANTOR: Not at this time.

MR. WEILER: No.

THE COURT: Suppose you have the witness simply testify as to what he learned from the record.

MR. ENNIS: Your Honor, may I discuss this point a little more, either before the jury or at the bench?

THE COURT: Just ask questions as to what he knows from the record?

MR. ENNIS: I can and I will. I also wish to ask questions based on his reading of the deposition.

THE COURT: You will have to call him after the plaintiff testifies.

MR. ENNIS: Could we approach the bench on this, your Honor?

THE COURT: All right.

(The following occurred at the side bar.)

MR. ENNIS: I'm sorry, your Honor. I don't mean to be dragging things. It is my understanding that the new Federal Rules of Evidence, that an expert may testify as to his reasons and rely on something even if it those documents are not admissible

evidence or never --

THE COURT: He can't testify on what the plaintiff testified he is going to be. He hasn't heard it and if the plaintiff isn't here --

MR. ENNIS: I'm not asking him to do that. If it is reasonable to rely on this kind of thing, let me find exactly where the rules on experts is. Here it is, 701.

MR. KESSLER: There has been a great deal of litigation in the criminal area in the US v. Bear.

MR. ENNIS: It is my understanding of these new rules that he can testify on the basis of documents, that it is reasonable for people in his profession to use, even if those documents cannot be admitted into evidence.

THE COURT: It is a different situation. It is for your own convenience that you're putting him ahead of the plaintiff and you can't put him on and ask him about the plaintiff's testimony --

MR. ENNIS: I'm not trying to be difficult. But the problem here as everyone knows is that the plaintiff has been described as recluse. We've had a difficult time to get her here. We have persuaded her to come here late tomorrow or Monday. But I am

not even sure of that. She is afraid to leave her room. This doctor is leaving on his vacation tomorrow. Can we do it subject to connection and then maybe we can strike it.

THE COURT: As long as you don't ask about the plaintiff's statements.

MR. ENNIS: I have to refer to this deposition. I'd be happy to leave it --

THE COURT: Not necessarily.

MR. KESSLER: There are two or three other psychologists in this case and they will be witnesses and they are not on vacation next week.

MR. ENNIS: This is our major witness, your Honor.

MR. WEILER: We're not offering it.

THE COURT: HAs he talked to her?

MR. ENNIS: No.

MR. WEILER: He read the hospital record in order to inform himself of this case just as you would read a text book on psychiatry. This one document this man is being examined on is not offered for proof, it's offered only for examination to get a more full picture which he based his opinion and statements --

MR. ENNIS: I understand the problem.

MR. KANTOR: In light of counsel's statement, in the US Court of Appeals, Second Circuit, 1974, this is not the issue that she should --

MR. ENNIS: I'm not going to ask questions about that.

THE COURT: Restricted to the hospital record.

MR. ENNIS: May I take exception to that rule, your Honor. Because it's going to make it very difficult for us to proceed.

THE COURT: Yes.

(Following occurred in open court.)

DIRECT EXAMINATION

BY MR. ENNIS:

Q Dr. Wood, are you able to ascertain from the hospital records whether plaintiff was given drugs over her religious objection?

A Yes.

MR. KANTOR: Objection.

THE COURT: Overruled.

Q I don't believe I heard the answer?

A Yes.

Q Doctor, what is the standard method of administering drugs in a mental hospital?

Christian Science religion?

A I've read the Mary Baker Eddy book.

Q Would you state who Mary Baker Eddy is?

A Mary Eddy was the woman who was the founder of Christian Science.

Q Based on your reading of her book can you form an opinion about the willingness of a Christian Scientist to accept medical treatment?

A Yes.

Q What is that opinion --

MR. KANTOR: I'm going to object to that at this point. I don't think reading one book qualifies this witness as an expert in religion. It has a complex origin --

THE COURT: It seems to be a sound objection.

Q Do you have any other sources of information about the Christian Science religion?

A My personal relationship with Christian Scientists -- but I don't think it --

Q You have had personal relationships with Christian Scientists?

A Yes.

Q Have you ever discussed these issues with them?

A Yes.

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Q Based then on your familiarity with Mary Baker Eddy's book, about Christian Science, and your conversations with Christian Scientists, are you able to form an opinion of the willingness of a Christian Scientist to accept medical treatment?

MR. WEILER: I object.

MR. KANTOR: I respectfully object.

THE COURT: I have no evidence before me that the Christian Science religion is a monolithic religion. It could have many forms as Communism.

MR. ENNIS: Perhaps the witness knows the answer to the question.

THE COURT: I don't know. He is an Episcopal priest. He can give us a range of Christian Scientists opinions --

MR. ENNIS: Do you think you can give us the range of Christian Science opinion --

MR. KANTOR: Objection.

MR. KESSLER: Objection.

THE COURT: I'll let him answer.

A A full range, no. But then again I don't think I could give you a full range of Episcopal principles --

THE COURT: I think we have to wait for the plaintiff as to the significance of it.

MR. ENNIS: Your Honor, may I be clear on one thing. If we are waiting for the plaintiff, it will be her opinion of what the Christian Science religion is and it would not necessarily be Christian Science. Those are two different questions. Is that my understanding --

THE COURT: Well, we will hear her testimony.

MR. KANTOR: If your Honor please, I apologize for interrupting counsel. I think the question before the Court is what is Christian Science. Not someone's opinion of it. As your Honor said there are many degrees as there are degrees in any religion and there is no approach to it from --

MR. ENNIS: Let me ask this question then.

Q Doctor, is there any evidence in either of the hospital records that anyone on the staff of either of the hospitals ever doubted that the plaintiff was in fact a follower of Christian Science --

MR. KANTOR: Objection.

THE COURT: No, he can answer that.

THE WITNESS: No.

Q Is there any evidence that anyone on the staff of these hospitals attempted to make inquiry into that subject at all --

MR. KANTOR: Objection.

THE COURT: Overruled. You can answer.

A No.

Q Is there any evidence in the record that she was a Christian Scientist?

A That is all over the place, yes.

(Continued on next page)

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Q I'm not talking about only statements and claims, do you see any evidence in the record referring to I am a Christian Practitioner --

MR. WEILER: Objection.

MR. KESSLER: Objection.

MR. KANTOR: Objection.

THE COURT: Sustained. We heard what is in the record already.

Q Dr. Wood, based upon your review of the hospital record and all the information contained in these records, are you able to form an opinion as a psychiatrist concerning the effect on the plaintiff of the violation of her religious beliefs --

MR. WEILER: Objection.

MR. KESSLER: Objection, your Honor. By whom, when, in what way?

THE COURT: Well I think the case is restricted only to the ten weeks that she was in the hospital. Let him answer that with that restriction.

A Would you repeat that question?

Q Based upon your review of the hospital records and information in those records only, are you able to form a professional opinion as a psychiatrist concerning the effect on the plaintiff of a violation of her religious

THE COURT: All right.

THE CLERK: Three-page - -

THE COURT: It will take a little more time, but we will go ahead.

THE CLERK: Marked Plaintiffs' 4 for identification.

(So marked.)

BY MR. GASSEL:

Q Dr. Messinger, I don't want to go through the information in that curriculum vita line by line, but perhaps you can highlight some of the points in it.

Are you a licensed physician?

A Yes.

MR. WEILER: Your Honor, I am prepared in behalf of Dr. Olins to concede the professional qualifications of Dr. Messinger, if that will speed the - -

THE COURT: Well, I think if you do not let the curriculum vita in, that a few questions so the jury will know the basis for your concession is appropriate.

MR.WEILER: Thank you.

Q Where did you go to medical school, Dr. Messinger?

A Harvard Medical School.

Q Where did you do your internship and residency?

A At - - I did my internship in internal medicine at Grace New Haven Hospital. That's part of Yale University.

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I did my entire psychiatric training at Bronx Municipal Hospital, in the Bronx.

Q I see. Then you are a psychiatrist as well?

A I am a psychiatrist.

Q What is your present position, Dr. Messinger?

A I'm director of the Child and Adolescence Psychiatric Clinic at Metropolitan Hospital, a large city hospital here in Manhattan, and I'm an assistant professor at New York Medical College.

Q Thank you.

Are you active in any professional organizations?

A Yes; in the American Psychiatric Association, and I'm on the board of directors of the New York Council for Child Psychiatry.

I'm also a board-qualified psychiatrist and child psychiatrist.

MR. GASSEL: At this point, your Honor - -

A (Continuing) Board certified, I'm sorry.

MR. GASSEL: At this point, your Honor, if there is no objection from counsel, I again move the document be received in evidence.

MR. WEILER: Your Honor, I've conceded the qualifications of our friend. I believe that that - - from Dr. Olins. I don't speak for rest of counsel.

delusions of persecution would lead him to that conclusion. That's a supposition.

Q All right. Thank you.

Doctor, in your opinion, and based on those documents in front of you which were available at that time, was Miss Winters in need of immediate treatment at the time she entered Bellevue which would have required the administration of drugs?

MR. KESSLER: Your Honor, I will object unless he can testify with a reasonable degree of medical certainty that he would use in his own practice based upon the material that he has read. That is, whether he can make any opinion on it at all.

THE COURT: Without seeing the plaintiff?

MR. KESSLER: That's correct.

THE WITNESS: I feel comfortable making that statement.

THE COURT: I think you need a little more foundation for the question, Mr. Gassel.

Q Dr. Messinger, if all there was was the evidence which you have before you in the record, could you form an opinion about whether she was in need of immediate treatment at the time she entered Bellevue?

A Yes.

Q What would that opinion be?

A The opinion would be that - -about the last thing that I would do would be to give her drugs.

MR. WEILER: Your Honor, he dropped his voice and I don't know - -

A (Continuing) The last thing that I would do is give her drugs.

MR. WEILER: Your Honor, that is not an answer to the question.

The question was, whether she needed attention, not whether she needed drugs.

Therefore, I move to strike the answer.

MR. GASSEL: I believe the question was whether she needed treatment in the form of drugs.

THE COURT: I did not understand that.

I will let the answer stand.

I do not think it is responsive.

MR. GASSEL: Thank you.

Q Doctor, can you form an opinion on what effect it would have as a matter of treatment and diagnosis for a patient to be reporting these - - this diagnosis and those dianostic symptoms to be drugged over her objection?

MR. WEILER: Objection to "being drugged."

THE COURT: Sustained.

possible after-effects.

I believe that the jury has a right to know any actual after-effects, where damage is based upon possibilities are clearly impermissible.

THE COURT: I thought the claims for any after-effects had been withdrawn.

MR. ENNIS: Your Honor, I think - - I think the question intended after-effects during her hospitalization of medication in the hospital.

THE COURT: All right.

A (Continuing) Yes. In fact, in the Central Islip record, she repeatedly stated her distress at getting the medication.

Q What form would - -

MR. KANTOR: Excuse me. I object and move to strike as not responsive.

THE COURT: Yes. Strike it out.

Read the question again.

(Record read.)

A (Continuing) Yes.

THE COURT: What is the opinion?

THE WITNESS: The opinion is that it would cause anxiety and agitation because it's - - it was an experience antithetical to her religious beliefs and her sense of self, her identity.

Q Would you expect as a psychiatrist that there would be a long lasting psychological effect?

MR. WEILER: Objection. I believe, your Honor, that certain ruling of a certain judge at a particular time, you - - should be referred to. I will not state where or how, but I think your Honor has the burden of my objection.

THE COURT: I guess present and past mental and physical suffering are still in the case.

Go ahead. You may answer.

MR. KESSLER: Your Honor, I would object on a different ground, if I may; and that is that the word "possibility" is not sufficiently precise to be a basis of damages. It's speculative, clearly prohibited.

The question is if he can determine that there were in fact - -

THE COURT: Overruled. Go ahead.

THE WITNESS: I'd like the question repeated, if you will.

(Record read.)

A (Continuing) Yes.

Q Of what sort, what manifestations?

A Loss of self-esteem, feelings of anger against those who perpetrated what she saw as a violation of her religious

A (Continuing) If a - - if an orthodox Jew or Moslem were forced to eat pork, or if a woman were violated sexually, the effect of that event doesn't end at the termination of the physical event.

MR. GASSEL: Thank you.

No further questions.

MR. WEILER: If your Honor please, may I, in view of the answer that has come out, ask that the jury be instructed to disregard that answer? Because we're now in collateral matters that may be completely outside the ken of what we are dealing with.

THE COURT: I think the examples were - - at least one of them was very extreme and the jury can bear that in mind.

I think you can cover it on cross-examination.

You may proceed first, if you wish, Mr. Weiler.

MR. WEILER: I think I can be short, Judge.

CROSS-EXAMINATION

BY MR. WEILER:

Q Dr. Messinger, what is the basis for your discussions and answers to the jury, in addition, of course, to your qualifications, which I in behalf of Dr. Olins have conceded? For example, you have read, I am sure, both

Q Did you discuss -- what matters did you discuss with her at that time?

A All I did was make some conversation about ancient Greek history. That's all.

Q Did you discuss any other matters?

A No, I don't recall that I did. But, a doctor came in and he wanted to take my blood pressure and I objected. I said I believe in Christian Science and was relying on it for any treatment I might need. He went away with a knowing smile.

Q Was this in the presence of the young lady?

A Yes, it was, I believe.

Q What happened after that?

A I was taken upstairs and I was thrown across a table by several attendants and injected in the buttocks with some sort of medication.

Q Were you told anything about this before this happened?

A No. I was just seized and I felt the whole thing a murderous assault upon my person --

MR. KANTOR: Objection and I move to strike.

THE COURT: Yes. Strike out the last part.

Just answer the questions, Mrs. Winters, please.

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was told any time I refused I would be injected with, I suppose, what they call a tranquilizer drug.

Q Who told you this, do you recall?

A Yes -- the nurse. I think her name was Grant.

Q You think her name was Grant?

A I believe so.

Q And do you recall how many times you received injections or inoculations at Central Islip?

A Well --

Q Approximately.

A Of course, I conceded -- after that I allowed -- the next time the photographer was there I allowed myself to be photographed because the injection was so physically, not only physically but psychologically painful --

MR. KANTOR: Objection.

THE COURT: Sustained. I think that is beyond the question.

Q Were you told to take other medication besides the injections?

A The tranquilizers were issued several times a day.

Q Every day?

A Every single day in the week from my stay right through until almost the end of July.

THE COURT: She can tell us what happened afterward but cannot state that it was from the drugs.

MR. WEISS: Of course. That is why we gave the medical testimony first -- to interpret the effect.

THE COURT: What happened after she received the drugs, would be a better way to put it.

(Conclusion of sidebar discussion.)

(Following held in open court:)

DIRECT EXAMINATION

BY MR. WEISS (Continuing):

Q Miss Winters, do you recall what physical sensations you had after the first injection you received at Bellevue?

MR. WEILER: Objection.

THE COURT: Overruled.

A It was shock.

Q What?

A Shock.

THE COURT: That's not exactly physical.

MR. WEILER: My objection was based upon the fact that there was only one injection at Bellevue and the question said "after the first injection at Bellevue." There was only one. It wasn't an objection with regard to the other matter we discussed.

THE COURT: I guess "the first" related to Bellevue vs. Bellevue rather than Bellevue vs. Central Isle.

Q Continue as to what physical sensations you had after your first injection in Bellevue.

A Shock.

Q What else if anything?

A Mostly shock.

Q And then after that --

A Well, I mean, I just felt stunned as though I were caught up in some terrible reign of terror, inquisition and I was being tortured for my beliefs.

Q That is immediately after the first injection, I assume.

MR. WEILER: Objection then as to form.

THE COURT: Overruled.

Q How -- Do you recall any feelings of sensation, say a half hour or hour after your first injection?

A I just felt strange. I couldn't describe it. I don't know -- sort of perhaps a person under the influence of some narcotic would feel that way. I don't know.

MR. KANTOR: I would object.

THE COURT: I think the answer is rather speculative. I will let it stand. The jury can evaluate

not competent to so testify.

THE COURT: Well, I think a witness can testify as to whether or not there is an infection but I understood that the plaintiff had withdrawn any complaint for any medical facts after he release from Central Islip.

THE WITNESS: This remained with me for years. It was devastating.

THE COURT: I think you and your attorneys are not in agreement.

MR. WEISS: I don't believe we withdrew it to that degree.

THE COURT: I understood it was withdrawn in open court.

MR. WEISS: I believe that is a mis-characterization.

THE COURT: I have to abide by what the Court reported was done.

MR. WEISS: It went to the temporary claim, your Honor, not the claim subsequent to Central Islip.

THE COURT: "Plaintiff is willing to abandon any claim that any present" --

MR. WEISS: "Present" -- that doesn't mean the period before --

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THE COURT: It wasn't made before me.

MR. WEISS: Yes, but it doesn't mean previous to the present.

MR. WEILER: May this all be received subject to a ruling at a later time?

THE COURT: Yes. I will receive it subject to a later ruling.

MR. WEILER: Thank you.

MR. WEISS: Yes.

Q Now, turning to the non-physical aspects, could you tell this Court as to how you reacted to the -- first, to the first injection at Bellevue; what you felt about that as far as from the physical reaction?

MR. WEILER: I believe this is already covered.

THE COURT: Yes. You moved from Bellevue to Central Islip. Are you going back to Bellevue?

MR. WEISS: Yes, for the psychological.

A Well, it had a devastating psychological affect --

MR. WEILER: Objection.

THE COURT: I will allow it.

Q Describe it.

A It caused me to go into a state of depression from which I have not recovered as yet.

THE COURT: Strike the last remark and the jury

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will disregard it.

Just answer the questions, please.

Q Can you go into more detail?

A It was such a shock and bewildering experience -- I didn't know why it happened and why I was being forcibly treated and medicated and examined and probed against my will --

Q And at Central Islip --

A (Continuing) -- I know I had heard about such things --

THE COURT: Please. You are a witness and your purpose here is to answer questions limited to the questions so we can be sure what relates to your case. Don't launch into a discussion on anything more than you are asked.

Q At Central Islip do you recall how you felt in addition to your physical feelings?

A Yes. I was extremely unhappy.

Q In what way?

A To be incarcerated like that and kept a prisoner not even allowed to attend Christian Science services which are on the premises.

Q Could you direct your attention to how you felt about the injections at Central Islip?

was here.

Dr. Drumgoole, is she sitting over there in the last row?

MR. WEISS: Is that Dr. Drumgoole?

MR. KANTOR: Stand up please, Dr. Drumgoole.

(Court spectator complies.)

Q Are you testifying that is Dr. Drumgoole?

A She looks similar.

Q Now, I asked when you first became interested in Christian Science belief. Could you tell this Court when you first began to rely on Christian Science beliefs?

MR. WEILER: Objection.

THE COURT: Overruled.

A Completely?

Q Yes.

A I began to completely rely on Christian Science probably about 15 years ago.

Q That would be say --

A 1960.

Q 1960?

A Right.

Q And now that you have identified Dr. Drumgoole, do you recall whether you had any discussions with her about your beliefs and the forcing of medication upon you?

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Winters-cross

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CROSS-EXAMINATION

BY MR. WEILER:

Q Do you remember me from last September?

A Well, I remember your face. I don't quite recall your name.

Q My name is George Weiler and I am the man who works for the City of New York.

A Yes. You were present when I gave the deposition.

Q Exactly. Fine.

Now, I believe that was the first time you and I had met.

A That is correct.

Q And this is our second time?

A That is correct.

Q Now, I believe that you had told us a few minutes ago that you didn't know why you were at Bellevue Hospital when you got there on the afternoon or evening of May 2, 1968. Did you tell us that a few moments ago?

A Would you rephrase that or state it again?

Q When you were answering Mr. Weiss' question --

A Yes.

Q (Continuing) -- and you said that you got to Bellevue on the early evening of May 2, 1968 --

A It was in the late afternoon.

Q The late afternoon. Thank you -- You didn't know why you were there?

A I don't know why I was there and I don't know why I was in Central Islip either. I was railroaded --

MR. KANTOR: Objection and move to strike the last part.

THE COURT: Yes, it is not really responsive. The jury will disregard the last part of the statement.

Q Before you were at Bellevue Hospital on that late afternoon, do you know where you were previously that day?

A Yes.

Q Tell us where you were.

A I was in the King Edward Hotel in Manhattan, West 44th Street.

Q And can you tell us, as best you can recall it, what happened that afternoon before you got to Bellevue Hospital?

A Yes, I can.

The management, which had changed hands while I was there only a few short weeks, told me that I could not occupy that room although that room was recommended by, at that time,

the agency known as the Department of Welfare and it was approved by them.

I was told I could not occupy that room and that I had to go up to a higher floor and I wasn't allowed to look at the room previous to being transferred.

I called my investigator and he was most unsympathetic and he told me I had to go along with the management and do what they told me.

I refused. I said, "You approved this room and this is why I want to stay." But, he sided with the management.

Q So that I gather that you were a tenant of the management --

A I was a tenant of the hotel, not the management. The management, when I first came there, was a kindly gentleman and he was forced out by someone else who took over the management.

Q I gather then that some room clerk at the Hotel King Edward and you, had a disagreement.

A That's not true, sir. I didn't argue with any room clerk. It was the woman manager who called me on the phone.

Q Now, the lady manager at the Hotel King Edward and you had a disagreement?

A She said I had to move out of that room and

move to an upper floor. In other words, take anything that was given to me whether I liked it or not. I had no choice in the matter although that room had been chosen and approved.

Q At the time you first had this disagreement as to the accommodations with the lady manager of the Hotel King Edward, at that time you were receiving an allotment of money and paying the rent directly to the --

A Correct --

MR. WEISS: I object to this line of questioning.

THE COURT: Well, I think this may have a bearing on the background which you brought out earlier.

Q Now, sometime during that afternoon I gather that you and the lady manager of the hotel had some words together.

A I never met her. I don't know how she looked. I could never identify her. She just spoke on the phone.

Q So, you and she, over the phone, had a disagreement?

A I wanted to know what I had to move and she said it was none of my business. She said in effect that I was to get out of there.

Q What next happened?

A I refused. I had my own money to pay the rent and they refused to accept it. Someone called the police and my door was smashed down and I was placed in a strait-jacket while I wasn't even verbally violent.

The reason this happened -- and I don't say this in any self-pitying way -- was because I was poor, friendless and alone.

Q At this time you had lived for about two months at the hotel?

A No, less -- about a month.

Q And before that you were at the Hotel Pierrepont in Brooklyn?

A Yes. And, by the way, the Pierrepont Hotel was purchased by Catholic charities --

THE COURT: Very interesting to us who live in Brooklyn but it does not relate to this case.

Q In March, two months before May, was there a time when Dr. Reich visited you at the Hotel Pierrepont?

A Yes. I made a very stupid mistake. I was told I had to have medical approval to have my own bathing facilities. So, to choose a lesser of two evils, I chose a psychiatrist instead of a medical doctor, thinking the psychiatrist would have some understanding of my problem and back me up and say, "This woman needs her own bathing

facilities." But, he wrote up an adverse report and in fact, I was threatened.

I said, "I changed my mind and don't wish to see the doctor," who came with an investigator and the investigator said, "If you don't see us we will leave and I will have you declared a vagrant."

Q You saw Dr. Reich?

A Yes. I had no choice but to admit him under those circumstances.

Q Was this the first time you had ever seen a psychiatrist?

A As far as I can remember, yes.

Q Now, can I bring back to your mind please, the year of 1955 --

A Oh, I know what you are referring to.

Q To Kings County Hospital?

A Oh, yes.

Q Tell the jury about that in your own words, please.

A Well, first, that was 1955, I believe.

Q Yes, tell us about that.

A A social worker at St. Johns Hospital on Herkimer Street and an Episcopalian worker of a church on Carroll Street wanted me committed. They decided that I ought

to be committed. So, they took me to Kings County Hospital in Brooklyn and tried to get the doctors there to agree to commit me and they refused. They said "There is nothing wrong with this woman. We see she is a little argumentative but that's all."

Q This was Kings County Hospital in 1955 or 1956?

A Yes.

Then, on a further occasion, a Department of Welfare investigator didn't know where to find a place for me to live so he dumped me off in Kings County Hospital. But, the doctor refused and he was very sympathetic and he sent me to a home for woman on St. John's Place and I stayed there for one night and then went back to the hotel where I resided.

Q I suppose it is fair to say that on both those occasions your relationship with the psychiatrist was very good?

A Well, the Kings County Hospital, the psychiatrist seemed to be a humane, compassionate individual.

MR. ENNIS: Mr. Weiler seems to be asking a lot of questions about an attempted but unsuccessful commitment to Bellevue. I don't understand why that is relevant. We are not challenging the legality of the commitment to Bellevue.

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Winters-cross

Q Now, when you said this morning that you didn't know why you were at Bellevue Hospital -- "I really didn't know why I was there" -- do you remember saying that this morning?

A Yes. I don't know why I was in either place. It was forced imprisonment.

(Continued on next page)

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CROSS-EXAMINATION

BY MR. WEILER CONTINUING:

Q Did you know why you left the King Edward Hotel?

MR. ENNIS: Objection. We return again to the circumstances of the commitment.

THE COURT: No. This is her state of mind at the time she was at Bellevue.

Q Did you know that?

A What, sir? I don't know what you asked.

Q Did you know under what circumstances that you left --

A No. I don't know why I was pulled out of my room. My door was smashed down and I was pulled out of my room and taken to Bellevue. I really don't know why unless that's a common practice if one is without money and without friends and alone and then, that probably happened to a great many people. It certainly happened to me.

Q So, you don't know what happened?

A No. I don't know. I didn't know that if a person objected to giving up his room that he was taken to the psychiatric ward of any hospital. I never knew that.

Q Do you know you just raised your voice to me?

A I certainly know. I am very angry, very upset about it.

Q Did you inform people at Bellevue Hospital that you had been writing letters to the Mayor, for example?

A Yes. I thought that I had the right as any American to petition any politician in office at any time, any where.

I tried to bring it to the attention of Mayor Lindsay and he had an office for that purpose, where a citizen could complain and request things.

I didn't write any letters, sir. I telephoned. Yes, let's change that. I did not write any letters.

Q Did you inform the doctor that you had had a dispute with the room clerk at the hotel?

A What room clerk in what hotel?

Q Call it the manager?

A I didn't have a dispute. I never saw the woman. She said she was a manager and called me on the phone. She could have been anybody.

Q Did you inform the doctor of any of these things?

A What sir? I didn't understand that.

Q Did you inform the doctor when you got there, let's say 6:00 o'clock, 6:30 or whatever time it was, early that evening, did you inform the doctor of the circumstances of what had happened at the King Edward Hotel?

State, yet there is no evidence in the record that would indicate in forcing the unwanted medication on Miss Winters, the State was in any way protecting the interest of society or even any third party. In fact the Bellevue authorities found possible harm to herself and a conclusion was indicated on one of the medical forms italisized. Example: all that and in this case the authorities could not legally retain her in the hospital, but rather only that her first amendment rights were violated as a result of compulsory medicine -- the way I read that, the Court was saying that the person is dangerous, and in the hospital the right to refuse treatment is not the right --

MR. BANTOR: No defendant has so claimed. So I think that instruction would be misleading and prejudicial and does attack the opinion of the Second Circuit.

THE COURT: For the doctor to have done less than a violation of obligation to the people of the State to seek a cure for the mentally ill patient, so that there'll be no longer dangerous or disruptive to themselves or to the public and so that they will no longer occupy space in a mental institution --

MR. ENNIS: That decision was reversed.

MR. KANTOR: I think it is a Second Circuit opinion.

THE COURT: I have the wrong one.

MR. ENNIS: Actually, we have no objection to Number 14 proposed by the defendants. Final cause is deleted. Unless necessary to prevent her to be a danger to herself or others.

I don't know how it differs from your 41.

THE COURT: Well, it's not that much on it. I think I'll leave it out.

MR. KANTOR: You're going to leave it out, your Honor.

THE COURT: I'll use Plaintiff's 41, 43 --

MR. KESSLER: 42, your Honor. I would object also in that it says it involves a charge to the jury that the Court of Appeals has made certain rulings. I think that though that maybe accurate, it involves giving a more significant weight than is necessary. Your Honor can charge on what the law is and without making reference to the Court of Appeals.

THE COURT: I am going to read your 15 instead of Plaintiff's 43. I am not going to instruct the jury to find damages. That is 42 also.

MR. KANTOR: Your Honor, I believe 42 will have to be stricken.

then the question, "including medication?

"Answer: Including medication. But I'm also aware of considerable inconsistencies in this practice, as I suppose it would be in any religious practice."

Is that a fair summary of your understanding?

A Yes.

Q And that was your understanding in 1968?

A Yes.

Q Now Dr. Miller, have you issued regulations governing the care and treatment of patients?

A Ever?

Q Yes, ever?

A Yes.

Q Have you ever issued regulations governing the medication of patients who object on religious grounds?

A No.

Q Now, it's fair to say, is it not, that in 1968 and even before 1968 the problem of patients objecting to treatment or on any grounds was a common problem in the Department?

A I would say it was -- it was a difficult problem among -- in psychiatric practice -- what it was concerned among others were patients involuntarily hospitalized.

Q And that problem was sufficiently important

that you appointed a task force to look into the problem of patients who objected to medication or any other forms of treatment?

A Well, actually we had done many things that were concerned with the examination and protection of rights of patients and really exploring how the most fully be recognized. As you know, the mental hygiene law was that -- beginning in 1966 or just before, in the process of a major recodification and among the major concerns of that were the issues of rights of patients and how best they might be protected, and I personally would consider the establishment at about that time of the Mental Health Information Service as an arm of the Court present in every hospital to represent patients, to recognize problems that they had and try to speak out to help everyone synthesize patients rights, recognition of that preoccupation and value which we attach to that, and as you asked in your question; yes, there have been task forces appointed to look at the issues of a patient's rights including the problem, the difficult problem of the involuntary patient who chose not to be treated in some particular way.

Q And that preoccupation, as you put it, were patient's rights, were they process that was under way in 1968?

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A I think it was, yes; in 1968, yes.

Q Dr. Miller, is it fair to say that involuntary patients in mental hospitals are a vulnerable class of people.

MR. KANTOR: Objection.

THE COURT: Overruled. I don't know what it means but the witness can answer it.

A Let me see if I can answer your question, because I'm not quite sure what it means either. In general terms if by vulnerable you mean that they are not in a good position to represent their own interest, I would say in general that that is one of the aspects of involuntary hospitalization. They are also protected as well as vulnerable, so we speak of them purely as vulnerable, I don't think captures the flavor of their predicament.

Q Dr. Miller, do you think that patients should have the right to participate in planning their treatment programs even involuntary patients?

A Yes.

Q And that they should -- psychiatrists should consult with them about what treatment should be prescribed for them?

A All patients, all physicians.

Q And in fact, do you think patients should have the right to object to specific forms of treatment, even

defendant -- in fact for Mr. Kantor, this memoranda which shows that as to the opinion of the Second Circuit Department Counsel and Mr. Ford recommended that no regulations be issued pending --

THE COURT: Mark it for identification.

MR. ENNIS: Can I say why we think it is. Essentially the defendant's posture in this case will be that they didn't know about any specific problems in 1968,if they had known about it they would have taken appropriate steps. We wish to show once this defendant knew he still did nothing, showing in our opinion, complete indifference to the rights of patients on this particular question.

THE COURT: All right, Mr. Kantor.

MR. KANTOR: First of all, the question of whether or not Commissioner Miller was indifferent or otherwise, the right of patients is not in issue in this lawsuit. What is in issue in this lawsuit is whether or not this plaintiff's rights were violated, whether or not she suffered injury and whether or not there was any defense. Now, if plaintiff is going to claim that by failing to issue regulations, somehow the doctor violated this patient's rights in 1968, and would tend to violate this patient's rights in 1971,

I should urge the Court that first of all we were waiting for a decision from the Supreme Court of the United States because it was a novel question; that furthermore there is such a thing as quasi-legislative mentae, an issuing or failing to issue regulations the doctor was exercising a quasi-legislative power.

THE COURT: I'm not going to get into post-1968 regulations. Mark it for identification.

(Whereupon, side bar conference was concluded.)

MR. ENNIS: I would like to mark for identification at this time as Plaintiff's Exhibit Number 6 memoranda dated August 13th, 1971.

THE COURT: All right, mark it.

THE CLERK: So marked, Plaintiff's Exhibit 6 for identification.

Q (Continuing) May I ask the defendant if he has seen this memorandum?

THE COURT: I put it in in case of an appeal it's in the record.

MR. ENNIS: We offered it, there has been an objection, it's been sustained?

THE COURT: Yes.

MR. ENNIS: Then I have no further questions of this witness.

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THE COURT: Mr. Weiler, do you have any questions?

MR. WEILER: No.

MR. KESSLER: A few questions.

CROSS-EXAMINATION

BY MR. KESSLER:

Q Dr. Miller, you were asked on direct examination whether you were aware of a 1971 opinion which established a right; is that correct?

A I don't recall it.

Q You were asked when was the first time you became aware of the fact that there was a right of a patient to object to medical treatment on religious grounds in a mental hospital?

A Something like that.

Q And your answer was in 1971?

A Or thereabouts.

Q Were you party in this case at that time?

A I think so.

Q Were you aware of the decision of the District Court in 1969 in this case in which the complaint was dismissed upon the Judge's finding that there was no such right?

A I don't remember when I was aware that there had been a '69 decision, but I was ultimately aware of that.

hospitals was with making it possible to treat and to try to be as sure as possible when someone was a patient in a hospital, and involuntary patient, or any other patient, that treatment be available; and I think it fair to say for most psychiatrists their stress was on trying to make treatment available.

Q And one of the forms of treatment that was generally accepted at that time was hemotherapy?

A For certain illnesses, yes.

MR. KESSLER: I have no further questions.

THE COURT: Mr. Kantor.

CROSS-EXAMINATION

BY MR. KANTOR:

Q Doctor, you testified you became Commissioner of the New York State Department of Mental Hygiene in 1966?

A Yes.

Q Between the time you became Commissioner of Mental Hygiene and May, June and July of 1968, did you have any meetings with religious officers or priests, rabbis, ministers concerning patients in mental hospitals?

A There is a Chaplain's Association and I met with them from time to time, and representative in my office would meet with them on other occasions.

Q What was the purpose of these meetings.

A I must have, yes.

Q Medical treatment would include medication?

A Yes.

Q So you were aware at that time that the patient did not want medication on religious grounds?

A Can I comment on that? I was aware that the patient did not want medication, and that she was refusing medication on religious grounds. I don't know that I would necessarily draw the conclusion that that was all or that was the only reason she was refusing medication. As a matter of fact, I had my own thoughts why she was refusing medication which had to do with the fact that she didn't think she was mentally ill.

Q But at least one of the expressed reasons was that she thought it would violate her religious belief?

A Yes.

Q Was that the first time that any patient had ever objected to medication on religious grounds in your experience?

A That's the only time.

Q So it was an unusual even for a patient?

A Yes.

Q You were a resident, you were not yet qualified as a psychiatrist?

Allan Miller guilty of anything.

The next one is Thomas De Corta. Now, I'll be quite candid with you. I wish Dr. De Corta was here and had been here to speak with you to tell you what he believed and thought, understood what his understanding of what happened was. I'm sure you would have preferred it and I'm sure that Thomas De Corta would have preferred it. But, as you learned yesterday, for reasons beyond his control, he was unable to come from Oswego to New York to be here.

However, what do we know. We know that in 1968 he was a supervisor of psychiatry in the Mental Hygiene Services. We know that he made two entries on Miriam Winters' chart. He performed a physical, no. You will see evidence in the chart that in the hospital record of the psychologist examination, did he perform that, no. Did he perform any of the blood tests, no. Take a look at the nurses' notes. You will see no reference to him in the nurses' notes. Take a look at the history of the patient. The history of the patient on her first admission, it was signed by Dr. Jordan. Then you will see a note on mental status. That is signed by Dr. Jordan. There are notes made that are dated May 14th, May 29th,

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(Whereupon, the Court resumed.)

(Jury now present.)

MR. ENNIS: Your Honor, can we state at this time, we did not want to object to anything Mr. Kantor said during his summation, because we did not want to interrupt him. We object at this time to the reference of De Corta being unable to be here and saying he wished he had been, we think that gives the impression if he had been here and testified he would have said I didn't know anything about it or acted in good faith. We ask the Court in its instructions to ask the jury to disregard those kinds of statements.

MR. KANTOR: Your Honor, I believe in my remarks I said do not know what he would have testified to and we cannot speculate as to what he would testify to.

MR. ENNIS: You did say you wished he were here.

MR. KANTOR: I certainly wish he had been.

THE COURT: Bring in the jury.

(Jury enters box.)

MR. KESSLER: Good morning, ladies and gentlemen. This is the last occasion that I'll have to address you in this case. Now, when I am finally done and when all the defendants are finally done with their comments, then Mr. Ennis will be able to talk to you about his view of the case. Because of procedures of the courtroom, I will not be allowed to respond to what he has to say. Of course I do not know what he will say, but I hope that after he is finished that you will consider what I have suggested to you and that you will consider very carefully in the light of the evidence in the case and what has been proved, particularly as to Dr. Blankfeld. Because he is the only party in this action that I am concerned with and he is the only party I represent -- I'm sure Mr. Ennis, an excellent lawyer, he will give you a powerful and emotional statement as to the rights involved in this case. I ask you to think of what he says, but think of the evidence and what the evidence has proven.

I think that when you do that, I submit to you that you will find that Dr. Blankfeld has proven to you conclusively that he is not liable.

Now, this is a very odd case. These doctors and

Dr. Blankfeld in particular are being sued here because he successfully treated Miss Winters for a mental illness. Successfully treated. She was improved when she was released, from a sickness, that she had when she came to the hospital. I think you will find from having seen her, she has improved, still is there any doubt when she came to the hospital on May 2nd, 1968, that she was seriously ill. I don't think there is the slightest doubt at all about that. Only three out of twenty people who come to a mental hospital, to the Emergency Room, get admitted. Pressure, if there is any pressure on the admitting doctor is not to admit people to the hospital, let them in.

Also, I think it is very important in this case that the plaintiff through her lawyers have not contested the legality and the propriety of her being admitted to the hospital. They hadn't contested that because it is not contestable. You cannot -- no one can be admitted to a mental hospital unless they are seriously mentally ill. That is not an issue before you. That is admitted in this case.

Of course, you have other evidence on that. You have evidence of the letters of the doctor.

Because three years after, three years after this happened the rug got pulled out under these doctors. For the first time the Court of Law, that had jurisdiction over this area in the country, the first time said the patients have some rights to refuse treatment on religious grounds. The ruling by the way say all rights, some rights. The Judge will tell you what the law is, but that ruling didn't come for three years later. So now they are here before you. Something like getting a speeding ticket a week after you were driving and find out Hey, they changed the speed limit on me. That's why the case is here before you.

Fortunately, however, in this reinterpretation of the First Amendment and this ruling was the re-interpretation of the First Amendment which always existed, just as it did for 200 years. It didn't quite exist in quite the form that it is now in the reinterpretation of the very fundamental concept of justice, just as in the situation of the speeding ticket. Dr. Blankfeld cannot be found liable for having performed any acts in 1968 if he acted in good faith. And it is a very very similar concept, it's a vital and important concept that Dr. Blankfeld

isn't even signed on paper until you get to Central Islip, where the original of the so-called commitment order was received.

Now there are two things that I think that we should note that are not in this case. Number one, and this has been stated, if you remember on the very first day in the jury selection by the Court, at the same time for example he said if there is a judgment it would be payable by the doctor himself. He also said, the legality and the circumstances of the commitment are not before you. That is not being challenged and remember that, is the thing that Dr. Grant and Dr. Olins were doing. That is the commitment they were talking about.

So the circumstances there are not being challenged. The claim, is there is any, would have to be on surmise, on guesswork and conjecture and that would be if Dr. Olins had done such and such and had gone back and reviewed the file and the treatment with another doctor and he might have violated the ethics of the doctors and something else if he would have done it differently and he would have done something else but that is not what

everything I have talked about is the plaintiff's burden of proof. The plaintiff has no proof by a preponderance or a majority of the evidence of these steps. I have just gone through it and at this point, however, when we come to good faith defense, the Court will instruct you that it is the defendant's burden of establishing a good faith defense. It is on the defendant and not on the plaintiff.

The defendants must establish their good faith by a majority of the preponderance of evidence. If they fail to do so, then they have not established that defense, just as if the plaintiff failed to carry her burden and did not establish liability. That would mean if a defendant introduced no evidence whatsoever with respect to his or her good faith, then certainly the defendant has not carried that burden. If the defendant has introduced some evidence of good faith, it's you job to weigh that evidence and determine whether it is convincing to you.

I think it is fair to say that we have received no evidence on this good faith point, from Dr. Kosovic and Grant. There has been no direct evidence on this point from Dr. DeCorta or Dr. Olins.

MR. WEILER: Objection.

THE COURT: I will remind the jury that you can consider cross-examination as well as direct examination. I think Mr. Weiler's point is that the jury can infer Dr. Olins good faith from the fact that was brought out through other witnesses.

MR. ENNIS: I did not mean to suggest the contrary. I said there was no direct evidence on the point. You are obviously entitled to weigh everything you learned in the course of determining whether the particular defendant did or did not make any good faith attempt. Let me discuss the evidence for a moment with respect to Dr. Blankfeld.

Was this medication necessary in the circumstances of the case as they presented themselves to Dr. Blankfeld: Dr. Blankfeld concede that since Ward M-7 was a secured ward, perhaps it would have been sufficient to transfer her to that ward without medication. But that he thought it would be in her best interest or good for her to have the medication.

Well, it is one thing to consider something in a person's best interest and it is a different thing to consider something actually necessary for that patient. I think you should weigh that

relevant?

MR. WEISS: It is as a matter of law that the argument on the facts were inappropriate argument --

THE COURT: I have heard you.

MR. ENNIS: I would like the Court to instruct the jury and this is something I should have brought up earlier, but it only came up during the voir dire, because -- the Court stated to the jury, the defense would be paying for the damages themselves and therefore it wasn't -- it is a feeling of sympathy toward the City and in fact, your Honor, I believe there should have been no comment on who would pay the City --

THE COURT: Is it a matter of law that the defendants pay.

MR. ENNIS: No. I don't think it is. Your Honor, in fact, in this day and age, I believe it is fair to say that the State defendants will not pay. Dr. Miller is employed and I think it is paid by the State. The corrective instructions should say that there is no evidence whether the defendants --

THE COURT: As a matter of law they are liable.

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MR. ENNIS: They may not personally pay out of their own pockets --

THE COURT: The source that covers has nothing to do with it. If it's their liability, they use the good will with City and State.

MR. ENNIS: It's one thing to say they are liabl and I agree they are liable and it's different to leave the impression with the jury that they are not personally liable. But it ill actually come out of their pockets and not being reimbursed. It is not the case with some of these defendants and I believe it's somewhat misleading for the jury. I wouldjust ask the Court to say that there's no evidence and the jury is to draw no inferences that the defendants --

THE COURT: There is no evidence and there's going to be no evidence of reimbursement by anyone.

MR. ENNIS: The Court left the impression withthe jury they would not pay. They said the defendants would pay --

MR. WEILER: If you feel that way, why did you continue with the jury selection, adopting the language and saying the jury was satisfactory and leaving it as it was. If that were true, why wasn't there an objection made at the time --

MR. ENNIS: I could not object while the jury was being picked, it escaped me until last night.

THE COURT: It is a point, as a matter of law, the defendant has paid the damages. That is under the collateral source rule. There is no concern for the jury if somebody else makes good to that.

MR. WEISS: Your Honor, as a matter of fact in Daly v. Hancheck (phonetic) did not personally come from the defendant. That's the way it was done in practice --

THE COURT: According to the Court of Appeals decision it is simply a matter of law. We will resume at 2:00 o'clock.

(Whereupon, the Court recessed for luncheon.)

COURT'S CHARGE 672

The plaintiff challenges that she was forced to take these medicines, even though she was never found to be mentally ill or incompetent by Judge or Jury and was not suicidal or homicidal and that it was not necessary to save her life or protect the public.

In a case of an ordinary person suffering from physical ailments a hospital or other authorities have no right to compel certain medication against a patient's will and in doing so violated her constitutional rights, unless it was necessary to prevent that person from dying or from being a danger to herself or others. And the law in New York is that a finding of a mental illness, even by a Judge and a Jury and commitment to a hospital doesn't prove that the patient is incompetent or unable to manage herself or her affairs.

An appointment of a committee to manage property is something different. It does not found to be incompetent by a Judge or Jury as a constitutional right and on religious grounds to refuse to take drugs that are not necessary to save that patient's life and the law provides that administering drugs to such a patient would violate the patient's rights under the constitution, even if they would benefit the patient or improve her mental condition.

COURT'S CHARGE

The defendants have a defense of good faith which I will describe later. That relates primarily for their liability to damages.

In order for the plaintiff to recover money damages.

So you can take the law to be if the plaintiff was forced to take medication and if it violated her religious beliefs and you believe her constitutional rights were violated, then it is for you to determine first whether one or more of the defendants sued in the case subjected or caused her to be subjected to a violation of her rights, and second whether they have a defense of good faith in this case.

In order for the plaintiff to recover money damages she has to establish by a preponderance of the evidence first that one or more of the defendants had some degree of personal responsibility for the violation of plaintiff's constitutional rights and second that those violations directly or approximately caused any physical or non-physical injury that she may have suffered.

An approximate cause means the latter was a substantial factor or had such effect of producing an injury that a reasonable man would regard it as a cause of injury.

somebody else did unless there was a failure of actual duty of supervision.

The defendants claim that if they violated the constitutional rights they did so unintentionally. The conduct and the admission to fail to didn't violate the constitutional rights. This is what I have called a good faith defense.

A good faith defense is a complete defense to liability.

So if you should believe from a preponderance of the evidence that the defendants reasonably believed in good faith, that his or her actions, conducts or omissions didn't violate what she or he should have reasonably have known to be a clearly established constitutional right, then you should enter a verdict for that defendant, even if you find that the defendants' actions or failure to take actions did violate plaintiff's constitutional rights.

At any rate there has been a lot written on this subject. I will read some of the more recent statements in a case where a couple of high school sophomores had been expelled for spiking punch and the Court found that at the school function, the Court found there had not been sufficient evidence. The Supreme Court said

in the specific context of the school discipline we hold that a school board member is not immune for liability for damages under such 1983 if he knew or reasonably should have known the acts he took within the seer of his official responsibility would violate the constitutional rights of the student effected or if he took the action with malice intent to cause the deprivation of constitutional rights or other injury to the student, that is not to say the school members are charged with predicting the further course of constitutional rights. A compensatory award will be appropriate only if the school board member has acted with impermissible motivation or with such disregard to the constitutional rights that his actions cannot ressonably be characterized as an act in good faith.

In a case relating to the state mental hospital, the Court said for the purposes of this question, an official has no duty to anticipate unforeseeable constitutional developments. The burden is on each defendant to prove each element of this good faith defense by a preponderance of the evidence. That means the plaintiff doesn't have to show that the defendants' acting with malice, ill will or in bad faith in order to prove her claim.

COURT'S CHARGE

678

Plaintiff has not claimed that she is suffering any present mental problem caused by the 1968 forced medication, except an unpleasant memory.

The defendants in this case are not charged with having any part in taking Miss Winters to Bellevue Hospital in the first place. The plaintiff hasn't claimed that the medication or actual medication constitutes malpractice of medicine by the doctor. You've heard a lot about whether it should or should not have been and how much there should have been and other drugs. That has a bearing on good faith and on damages, but if this was a malpractice case it would not be in this Court.

So it is only the constitutional rights that are involved here.

Now with respect to the foreseeability. You've heard it is a fact that until 1971 no Court in this state had ruled on the first amendment right to free exercize of religion, a christian scientist who was legally admitted to a mental hospital had a constitutional right to refuse proper medication.

You may consider the importance of the first amendment and the fact that it's been part of the constitution for 200 years in determining whether the de-

COURT'S CHARGE

fendant should nevertheless have foreseen that such administration of drugs after a protest on christian science grounds was a violation of constitutional rights.

There are no particular rules for fixing compensatory damages. There are fairly broad limits as to what is reasonable compensation for any pain or suffering or humiliation from the denial of constitutional rights that would be appropriate.

You can also consider whether you should issue punitive or exemplory damages which are authorized in order to punish a wrong-doer for some extraordinary mis-conduct or to serve as a warning not to engage in such conduct. Here the warning is pretty generally known from the 1971 decision with the Court of Appeals in this case. You can still consider whether some warning to others with respect to other aspects of religious freedom is necessary. If you find from a preponderance of the evidence that the plaintiff is entitled to a verdict for some compensatory damages and that the injury to the plaintiff was done maliciously, unwarrantedly or oppressively then in the exercize of discretion if you are unanimous in your choice to do so you can add a proper amount as you determine it for punitive and exemplory damages.

must consider this is not a full summary and you can take into consideration anything else you recall. This is a very unusual case. Sometimes the Jury can draw some inferences from what they observe about the contact of the parties in the Court room. You do not have that here. You can determine whether there are inferences to be drawn from their absence. Normally I would expect the plaintiff who is suing for thirty or more thousand dollars to be present to see what was going on. Miss Winters had no obligation to do that and so her absence doesn't prevent your giving a verdict for whatever amount you think she is entitled to.

Dr. [redacted], who still works for Central Islip is the only doctor who has been here most of the time.

You can consider in both instances whether this indicates any indifference to the case. Whether it represents an overconfidence or whether the doctor is simply relying on their expectations that the verdict will be decided on the merits and that they might have had a good case and they may not. That is up to you. You decide.

Now with respect to the seven defendants, Commissioner Miller was in charge of the institution with

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COURT'S CHARGE

over a hundred thousand residents. He said he testified, he never before had been faced with a situation where a Christian Scientist in a state hospital refused medication on religious grounds after a doctor had prescribed it. He had issued regulations on other subjects and he had some responsibility in planning department policy.

It would be imposing strict standards to say that Dr. Miller was at fault for not issuing a regulation to deal with the situation but the plaintiff said that the first amendment is so important that Dr. Miller should have thought of it and I will let you decide that issue.

With respect to most of the defendants, their responsibility for only, for what they did, if you find that Dr. Miller was responsible for not issuing a regulation you may find that he is responsible for all the damages for all the 16 physicians who had been mentioned.

Dr. Blankfeld was in the emergency room when the plaintiff was brought in by the police as described in a state of agitation and on the recommendation of the Department of Welfare he recommended medication by injection. Even though he had heard she was a Chris-

COURT'S CHARGE

tian Scientist and that she objected to even a physical examination, under the law set down by the Court of Appeals he shouldn't have probably have done that but he says he did what he thought was in good faith for the plaintiff's best interest believing her to be mentally ill. The plaintiff points out that there was no firm diagnosis of mental illness up to that time.

I might mention the reference in summation that Miss Winters stated that when she was taken up to the ward and given the injection she thought she was being murdered. I struck that out. That should really not have been mentioned in the summation.

Dr. Blankfeld prescribed intramuscular medication and he may be responsible for what he might reasonably foresee what would come from it but the adjectives don't belong in this case.

It is for you to decide whether Dr. Blankfeld in the defense of good faith has been established guilty and if not, how much plaintiff suffered from the injection which he prescribed and whether his prescription over her objection was a substantial cause to any injury later objected to.

Dr. [redacted] and Dr. Grant were not represented here and we say they are in default.

COURT'S CHARGE

You have a right to fix damages against them. They both prescribed medication during the week that the plaintiff was at the Bellevue Hospital.

They have not put any defense in.

You may treat them as being liable simply based upon the medical records and the testimony.

Dr. O'Lins at Bellevue reviewed the file and signed the certificate that plaintiff should be transferred to Central Islip for care and treatment, even though he knew or should have known she was a Christian Scientist and objected to medication.

Plaintiff says that he should have done more. He should have made certain that no more medication was given to plaintiff. Plaintiff says that he was responsible for the medication that Dr. Grant gave on or about the same day.

He didn't testify and you cannot infer anything because he did not testify. Whatever he said would have not added anything beneficial as to what is already in the record, but you can't guess he would have said something detrimental to himself. It is for you to determine the inferences. He talked with Dr. Grant, but without any testimony it is not a fair inference, you are jumping a gap where there is no proof. It is

supervision of one of the defendants here. In the case of each defendant if you find compensatory damages aren't appropriate you can also consider if the circumstances justify punitive damages and the amounts of such damages.

The plaintiff charged the defendants with that hoping you would be indifferent to the plaintiff's constitutional rights. I don't think that is necessary, it is an interpretation of their argument. You shouldn't be indifferent to plaintiff's constitutional rights, but you should consider also the rights of the defendants and whether the plaintiff has shown a violation of constitutional rights. Whether the defendants have shown a good faith defense, if there was such a violation and just how much each particular defendant had to do with what took place.

The plaintiff could have sued the City of New York for what happened at Bellevue. She could have sued the State of New York for what happened, but she couldn't sue any of the federal agencies. Plaintiff has a right as to whom she is going to sue and where she is going to sue.

The only importance of this is that it will emphasize what I have said, you cannot hold one defendant

of all seven defendants, a space where you can indicate whether you find for the plaintiff or for the defendant as to each defendant. And there are spaces for the determination of compensatory or punitive damages or both as to any defendant that you find liable.

It is a little hard to know just what to do about Dr. Covick and Dr. Grant. I left the liability blank, but really you should fill in liability, found for the plaintiff on Dr. Grant because if they did not put in an answer and hire an attorney and come in personally they have in that sense admitted to the allegations of the complaint except with respect to the amount of damages.

One more piece of paper, it takes a lot of pieces to put the charge together.

If you have any questions the Marshalls are sitting outside the Jury room door, you can bring in a note and we will get counsel and try to get a response to the questions. When you reach a verdict the Foreman gives the Marshall a note saying you reached a verdict and when you come in you will be asked to announce the verdict and if you find for either party the clerk will be asked to poll the jurors to make sure that all 12 agree on whatever verdict it is.

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the language in Wood versus Strickland, I think it is important. I don't think it was sufficient. I'm sorry I forgot about it.

(Whereupon,the Court recessed.)

(Whereupon,the Court resumed.)

(Jury now present.)

THE COURT: I have a request from the jury. They have a different understanding of good faith. I'll call them out and clarify this. Get them out and I'll read what I said again and I'll put in the sincerity too.

Mark this as a court exhibit, please.

THE CLERK: Jury note marked Court Exhibit 5.

(Whereupon, the jury returned from their deliberations at 4:40 p.m.)

THE COURT: Ladies and gentlemen, I have your note saying you have difficulty with the phrase "good faith" and you would like clarification on the point. What I can do is read what I read before about it.

The defendants claim if they violated plaintiff's constitutional rights, they did so unintentionally and acted in good faith with a reasonable belief that their actions or failures to act didn't violate her constitutional rights.

BELLEVUE HOSPITAL CENTER
PSYCHIATRIC DIVISION

6 2 68 PSYCHIATRIC ADMITTING

FACE SHEET

WINTER MIRIAM
11-95-81 5/2/68

Patient's Address:
120 W. 44th St., NYC

Tel. No. Ward No. N7 Admitting Physician Blankheed

ATTENTION: (Record Allergies, Addictions, Seizures, Suicidal, Homicidal, other)

PSYCHIATRIC DIAGNOSES: ICDA CODE

CSR/par. type 320. 3

PSYCHIATRIC CONDITION ON DISCHARGE:
Improved ____, Unimproved ____, Not treated ____
Died ____ Autopsy: Yes ____, No ____ Autopsy No. ____
Prosector _____ M.D.

FINAL PSYCHIATRIC DISPOSITION:
Home ____ (Care of) _____
Transfer ____ to CISH (Hospital) Court Hearing: Yes__ No__
Inf.__, Vol.___, 1PC___, 2PC X , Court Cert.___, Conval.___
Dates:
Other ___(Specify) _____

Against Medical Advice _____ Disch. by Court _____

CORRESPOND WITH:

1. Name UNKNOWN Relationship
Address Tel. No.
2. Name Relationship
Address Tel. No.

3. Name Relationship
Address Tel. No.

PREVIOUS PSYCHIATRIC HOSPITAL ADMISSIONS: (Dates)
Bellevue ____
Other ____

ADMINISTRATIVE NOTES: (Disposition Planning, Court Status, Etc.)

PMG/7/68

STATE HOSPITAL DISTRICT _____

HEALTH DISTRICT NO.

PATIENT'S IDENTIFICATION

HOW ARRIVED:
Hosp. Amb. ____ Other ____ Specify:

ARRIVING DATE 5/2/68 TIME 6:00 AM/PM

REFERRAL: Welf. ___, Self ___, Family ___
Friend ___, Police ___, Court ___
Other ___, Specify

Name Last WINTER First MIRIAM M.I.

REFERRING HOSPITAL:
POLYCLINIC

BIRTHDATE Mo. 6 Day 2 Year 10 Age 58 Chart No. 11-95-81

PRIVATE M.D.:

FATHER'S NAME -

MOTHER'S NAME -

ADDRESS TEL.NO.

SOC.SEC.NO. MEDICAID NO. MEDICARE

OTHER REFERRALS:

HOSP. INSURANCE

VETERAN STATUS VETERAN CLAIM NO.

PERSONAL DATA

BIRTHPLACE: U.S.

W X , N , PR , OTHER , SEX: F X

RELIGION: Cath X, Jewish ___,
Prot. ___, Other

MARITAL STATUS:
S X, M ___, Date ___ W ___, Date ___
Sep. ___, Date ___ D ___, Date ___

Living Children: No. Ages

EDUCATION:

PT. RESIDES WITH

OCCUPATION: (Kind of Work)

Date last employed

OUT OF STATE RESIDENT:

Citizen U.S.: Yes No.

STATE HOSPITAL STATUS:

ALCOHOL AND/OR DRUG DEPENDENCY

SUICIDAL ON ADMISSION YES NO CODE SELF-INJURY METHOD: INGESTION METHOD: VERBAL THREAT

MEDICAL DIAGNOSES ON DISCHARGE ICDA CODE

MEDICAL CONDITION ON DISCHARGE: IMPROVED , UNIMPROVED NOT TREATED

SURGICAL DIAGNOSES ON DISCHARGE: ICDA CODE

SURGICAL CONDITION ON DISCHARGE: Improved Unimproved Not treated

FURTHER MEDICAL TREATMENT: Needed , Not Needed

FURTHER SURGICAL TREATMENT: Needed , Not Needed

ATTENDING PHYSICIAN: /s/ OKOSOVIC M.D. Date

DATE OF ACTUAL DISCHARGE: 5/13/68 Time: 9:30 A.M.
(To Be Noted by Clerk)

Chart No._____

HOSPITAL_____

ADMISSION RECORD

Surname	First	Middle	Sex	Age	DOB	Date Admitted
WINTERS	MIRIAN		F	58	6-2-68	

Ward or Clinic

Permanent Address	Nativity	Color	Other(Specify)	Marital
120 W. 44 Street	U.S.	W X N		Status: S

Occupation

Dates of Previous In-Patient Admissions

FOR IN-PATIENT SERVICE ONLY

On discharge record the following data;
Use Terms and Codes of Standard Nomenclature

Date discharged_____ Condition: Improved___, Unimproved___, Not Treated___, A.O.R.___, Died____

Final Diagnosis: Main Condition_____Code No.
Additional Conditions_____Code No.
_____Code No.

Service_____Visiting Dr._____House Dr._____

In the following report include: FAMILY HISTORY: hereditary conditions and causes of family deaths. PREVIOUS HISTORY: habits, occupation, childhood diseases, other diseases, operations and injuries. PRESENT CONDITION: Date and mode of onset, possible cause, course, and review of systems. For trauma, include cause and time of injury.

58 year-old white female brought from West 44th Street hotel by police on recommendation of Department of Welfare. She plays the radio all night, guards the public wash room. Sends letters to Mayor demanding a room with a bath, etc. See letter. Patient feels she is being "framed" by "people at the head." "They want to get me out of the room." Denies drug/alcohol abuse. Past history psychdisorders - Kings County. MS - obese 58-year old white female, dressed neatly in black coat -- evasive, guarded, suspicious, negativity. Speech -- pressured, L.O.A., tangential, irrelevant, illogical. Thought -- Delusions of persecution and grandeur. Denies hallucination, suicidal/homicidal ideals. Sensors - . Oriented 13. Judgment, insight - nil. Spp. - CSR-Pt. Dated: 5/2/68; Signature /s/ Blankfeld, M.D.

The City of New York
Department of Hospitals

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_____ HOSPITAL

Chart No. 11-95-81

PHYSICAL EXAMINATION

Name WINTERS MIRIAN Admitted 5/2/68 19___ Ward N7

Local	Condition	Nose	Throat	Liver	Skin
Gen'l	Appearance	Mucous M.	Cardio vasc.	Spleen	Glandular Sys.
Eyes		Tongue	Lungs	Kidneys	Bones-Musc.-
Ears		Teeth	Abdomen	Sexual Organs	Joints
					Nervous System

5/2/68 Patient refuses physical -- "I am a Christian Scientist and prefer you wouldn't." Looks well.

/s/ H. Blankfeld

5/3/68 Obese

MP

Heart

Chest

Abdomen

CRS

SIGNATURE _____

Chart No. 11-95-81

HOSPITAL _____

CONTINUATION RECORD

Surname	First	Middle	Sex	Age	Date Admitted	Ward/Clinic
WINTER	MIRIAM		F	58	5/2/68	N7

1. Patient was brought in by police from her hotel room with note from psychiatrist of Welfare Department stating that has been living in room for years, not washing herself, demanding food in her room, writing letters to Mayor's Committee, playing radio all night and refusing any medical help.

2. Obese

3. Patient is elderly white female, single, Christian Scientist who claims that her parents were MD. She never worked in her life, no friends and plans for future. Patient was angry, hostile, demanding for imidiate(sic) discharge.

4. Patient is circumstantial, vague, evasive, hostile and paranoid. Her thinking is very rigid and concret with impoverished personality. No insight and her judgment was nill(sic). Her affect was inapropriate(sic). Patient is not able to take care of her and needs hospitalization.

5. Possible

6. CSR/par. type

/s/ Okosovic

164a

THE CITY OF NEW YORK

DEPARTMENT OF HOSPITALS

DOCTORS' ORDER SHEET

WARD N7

CHART 11-95-81

NAME WINTERS MIRIAN

ORDERED DATE	BY WHOM	Diets, Standing and Special Orders, Including Laboratory	DISPOSITION Action A T R D	By Whom
5/2	Blankfeld	Adings N7		
		Thorozine 50 mgm 1 or STAT		
		Thorozine 50 mgm po qid tho		
		Chloral hydrate 10 ce po		
		tro pr by mon		
		Rexlpr		
		CRS v 2 h pm		
5/3		Therazine 100 mgm PO oins		
5/5		Thorazine 50 mg po	Q I D	
5/7/68		Transver to PQ_2		
5/7	S. Grant	Thorazine 100 mgm p&qid	Q I D	
		(Do not transfer)		
5/9/68		Stelazine 10 mgm tid		
		Artane 2 mgm b.i.d.		
5/10		Chl. Hydrate 1 vec p.1H		

THE CITY OF NEW YORK - DEPARTMENT OF HOSPITALS

_____ HOSPITAL

1. Allow sufficient space between items to provide a blank line for each administration in the 24-hour period.
2. Indicate "AM" or "PM" after the time.
3. At the end of 7 days draw a line under the last entry and redate on the next line.
4. Record pertinent reactions to medication on the "nurses note" (S.R. 5005 and 5005A).

MEDICATION RECORD

CHART NO. 11-95-81

NAME WINTERS ADMITTED ____ 19__ WARD N7

MEDICATION	DATE: 5-2 Time- Init.	DATE: 5-3 Time- Init.	DATE: 5-4 Time- Init.	DATE: 5-5 Time- Init.	DATE: 5-6 Time- Init.	DATE: 5-7 Time- Init.	DATE: 5-8 Time- Init.
Thorazine	648KV	9KM	(a)9JS	(a)9JS	(a)9KM	(a)9JS	(a)9OR
50 mgm							
1 of stat &	9	1DC	(a)1JS	(a)1JS	(a)1KM	(a)1JS	(a)1OR
thing qid		5BA	(a)5BA	(a)5BA	(a)5AL	(a)5	(a)5D
to 100-5/3		9BA	(a)9BA	(a)9BA	(a)9AL	(a)	(a)9D
50 mg. 5-							
5-1pm							
Chl. hydrate	9	9			9AL		9D
po hs							

	5-9	5-10	5-11	5-12	5-13	5-14	5-15
Thorazine	(a)9KM	(a)9JS	(a)9OR	(a)9OR	(a)	(a)	(a)
50Mg	(a)1KM	(a)1JS	(a)1OR	(a)1OR	(a)	(a)	(a)
poqid	(a)5D	(a)5BA	(a) BA	(a)5BA	(a)	(a)	(a)
100 5/7	(a)5D	(a)9BA	(a) BA	(a)9BA	(a)	(a)	(a)
Stelazine		(a)9JB	(a)9OR	(a)9OR	(a)	(a)	(a)
10mg	(a)1KM	(a)1JB	(a)1OR	(a)1OR	(a)	(a)	(a)
po-tid	(a)5D	(a)5BA	(a)5BA	(a)5BA	(a)	(a)	(a)

THE CITY OF NEW YORK - DEPARTMENT OF HOSPITALS
SOCIAL SERVICE MEDICAL RECORD

Bellevue Psych. Hospital

NAME MIRIAM WINTERS ADDRESS HOTEL KING EDWARD 120 W. 44th, NYC AGE 58 REL.

FAMILY:
HOME CONDITIONS: Rooms Floor

DATE

Social Data Pertinent to Patient's Illness

5/2/68 Miss Winters brought here by police from her hotel on the recommendation of DW, accompanied by letter from DW doctor.

Patient feels she has been "framed" because the prople running the hotel she was in did not want here there. Patient lived for 40 years in Brooklyn till this past 4/4/68 when she moved to King Edward Hotel.

Patient denies any previous hospitalizations. Patient feels an affiliation with Christian Science beliefs and does not want medical treatment although she admits to not feeling well lately but would not discuss details of this.

Patient has no family in area but does have a friend Mrs. Gertrude Butler, TR 5-9240, who is a Christian Scitist. Patient asked that Mrs. Butler be called. Call to Mrs. Butler made to notify her patient was here. Mrs. Butler said she would not be able to visit.

Patient is very verbal, seemingly paranoid, tends to get off the subject to launch into discussions about religion, "evil."

Follow-up: If patient is admitted S.W. might call friend to inform her of patient's admission. DW should also be notified. Investigator=Mr. Caron, DW, 213 Duffield Street, Brooklyn. /s/ Lela Zaphiropoulos

CHART: 11-95-81

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

ORDER OF TRANSFER UNDER SECTION 78, PAR. 5,

MENTAL HYGIENE LAW

Albany, N.Y. May 9, 1968

ORDERED THAT MIRIAM WINTER

a patient at BELLEVUE PSYCHIATRIC HOSPITAL Municipal Hospital be hereby transferred on May 13th 1968 to CENTRAL ISLIP State Hospital upon execution of the certificate below by the appropriate authority of BELLEVUE PSYCH. HOSPITAL Municipal Hospital and the presentation of the original admission papers and applicable court order, if any.

BY THE COMMISSIONER OF MENTAL HYGIENE

CERTIFICATION

I. SANDRA GRANT M.D., hereby certify that _____ was duly admitted to BELLEVUE PSYCHIATRIC HOSPITAL Municipal Hospital on May 2nd 1968 is in need of further hospitalization at a State Hospital pursuant to provisions of the Mental Hygiene Law, and that he resides at 120 W. 44th St., N.Y.C. which is in the institution district of CENTRAL ISLIP State Hospital.

Sandra Grant, M.D.
Staff Psychiatrist
(Title)

Bellevue Psychiatric Hospital

FORM 57 MED. (3/67)

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

HISTORY OF PATIENT

(Doctor's Notes)

NAME OF INSTITUTION: CENTRAL ISLIP STATE HOSPITAL	
NAME OF PATIENT: WINTER, Miriam	
IDENTIFICATION NO.:	HOSPITAL NO.: 58008

ADMISSION NOTE

Christine Jordan, M.D.

May 13, 1968

Patient is a 57 year old white female being transferred from Bellevue Hospital with a history of persecution and religious preoccupation. Patient appears fairly neat and clean, hair is unkempt. She is restless, moving forward and backward in the room. She has her Bible in her hand. She is cooperative and responds to the questions spontaneously. She states she was in Bellevue Hospital only for a few days of rest, "but I was tortured there. People bother me, they want to kill me with their medication. I was put on drugs. I believe in Christian signs . I tell you later, I am exhausted." Patient denies hallucinations, hearing voices, and no suicidal or homicidal ideations could be elicited. Patient denies convulsions, blackouts, D.T.'s, pending charges. Patient is oriented correctly to time, place and person. She was informed of the rules and regulations of this hospital.

Christine Jordan, M.D./jc

MENTAL STATUS

Christine Jordan, M.D.

May 15, 1968

ATTITUDE AND GENERAL BEHAVIOR: Patient is a 57 year old single white female seen on Ward 2 West. This is her first admission to a mental hospital. She was admitted from Bellevue Hospital. Patient appears fairly neat and clean dressed in her own clothes, hair was unkempt. During the interview patient was restless, turning to and fro, and was eager to end the interview. Several times she wanted to lay on the bed to rest. Her face was pale, small edemas of her eyelids can be noticed. Several times she takes the Bible in her hands holding it against the examiner. She is fairly cooperative and attentive, her speech is incoherent and relevant, her voice is normal and loud.

STREAM OF MENTAL ACTIVITY: Patient's productions are made spontaneously. Speech is relevant but often incoherent and rambling. Being questioned about the reason for her hospitalization, patient became overproductive, restless and somewhat excited.

EMOTIONAL REACTIONS: Patient's affect is quite appropriate, her mood was somewhat depressed. Patient gives the impression that she is scared. How do you feel? "I am worried about all that was done to me. They needed in that hotel six policemen to overpower a weak woman as me. Thinking about all this I could be depressed and weary."

MENTAL TREND AND CONTENT OF THOUGHT: Patient gives her history as being a Christian scientist. "I understand God, I believe in Christian Science." Why? "This cannot be explained in one word, this costs time.

I am not crazy, I am physically exhausted and tired. I do need a rest. May I lay down on the bed?" (Shows the Bible), "I understand God, but I never heard voices. Why do people ask again and again?" Why were you brought to the hospital? "I was living in a hotel, and they called me to leave my room. I refused. They scared me, I got excitdd and so they forced me by the police to the Bellevue Hospital." Do people speak about you? "They bothered me at the hotel. They tortured me, but I didn't like to move upstairs in another room. . .and when the policemen came to pick me up, I got terribly excited. They tried to make me a mad maniac, but I am not. When I was brought to Bellevue Hospital, I was drugged too much. They killed me with the routine treatment. I was tortured there." Patient denies hallucinations, convulsions, blackouts, D.T.'s, pending charges and the use of drugs. Suicidal ideations? "Sometimes I think about this, but I have not the courage." "Death is unreality, nobody dies. There is God. I wish people believed in this." Patient denies feelings of persecution.

SENSORIUM, MENTAL GRASP AND CAPACITY

ORIENTATION: WELL AS TO THREE SPHERES.

RECENT MEMORY: GOOD.

REMOTE MEMORY: MILDLY IMPAIRED. Patient's father was F.W. Winter, M.D. Patient cannot remember his birthdate. He died in April, 1937. Patient states that he was a psychiatrist and a Supreme Court examiner in New York State. He took care of everything in his family. Her mother was Marianna Norden. Patient does not remember her birthdate. She died on November 8, 1927. Patient has no siblings. Patient was born on June 10, 1910. Patient denies mental illness in her family. Patient was taught at home for ten years until she was 18 years old. She never had a job. She states to have had an eccentric life. After the death of her parents, patient was living on the money she inherited and ten years ago she was put on welfare. "I tried housework, but it was too hard, I cannot." She states she had an affair with a man, but she has never married. Patient states to be religious but does not go to church. She is of the Protestant faith. "I am an independant Christian scientist." Habits: Patient denies the use of alcohol and cigarettes.

RETENTION & RECALL: GOOD.

COUNTING & CALCULATIONS: GOOD.

SCHOOL & GENERAL KNOWLEDGE: GOOD. HIGHER THAN HER EDUCATIONAL LEVER AT TIMES.

ABSTRACTION ABILITY: GOOD.

INSIGHT: MORE IMPAIRED ON PERSONAL MATTERS THAN ON IMPERSONAL MATTERS.

JUDGMENT: NORMAL.

SUMMARY OF MENTAL EXAMINATION: THIS 57 YEAR OLD UNMARRIED WHITE FEMALE WAS SEEN ON WARD 2 WEST. SHE APPEARS FAIRLY NEAT AND CLEAN, HAIR WAS UNKEMPT. PATIENT WAS RESTLESS, SOMEWHAT EXCITED AND HOLDING HER BIBLE IN HER HANDS. SHE WAS EAGER TO END THE INTERVIEW BECAUSE OF FEELING TOO EXHAUSTED. SHE WAS FAIRLY COOPERATIVE, HER PRODUCTIONS WERE MADE SPONTANEOUSLY. SPEECH WAS MOSTLY COHERENT AND RELEVANT. AFFECT WAS QUITE APPROPRIATE, HER MOOD WAS SOMEWHAT DEPRESSED, AT TIMES SHE GOT EXCITED. PATIENT STATED THAT SHE WAS A CHRISTIAN SCIENTIST. SHE SHOWED RELIGIOUS PREOCCUPATIONS AND MILD FEELINGS OF PERSECUTION. SHE ACCUSED THE EVENTS IN HER HOTEL

FORM 471a DMH (9/65)
(Form prescribed by N.Y.S. Dept. of Mental Hygiene)

170a

EXAMINATION BY AN EXAMINING PHYSICIAN

PATIENT NAME (Last) WINTER (First) MIRIAM (Middle)

ADDRESS 120 W. 48th St. N.Y. 10036

1. Pertinent and Significant Factors in Patient's Medical and Psychiatric History:

Pt. was brought to hosp. by police from her hotel room with note from psych. of welfare dept. stating "that she has been living in room for years, not washing herself, demanding food in her room, writing letters to Mayor's Off. playing radio all night and refusing medical help. Adm. 5/2/68

2. Physical Condition (Including any special test reports)

Obese

3. Mental condition: The conduct of the patient (including statements made to me by others) has been

Pt. is an elderly white female, single, Christian Scientist who claims that her parents were M.D's. She has never worked in her life, no friends and plans for future. Pt. is angry, hostile, demanding for immediate dishcharged.

4. The patient showed the following psychiatric signs and symptoms:

Pt. is circumstantial, vague, evasive, hostile and paranoid. Her thinking is very rigid & concrete with impoverished personality. No insight and her Judgement is nill. Her affect is inappropriate. Pt is not able to take care of herself and needs long term hosp.

5. Does the patient show a tendency to injure herself? poss ; to injure others? poss

Explain

6. Mental diagnosis (if determined) CSR/paranoid type.

We, Sandra Grant & Gerald Olling, M.D's (Print Name or Names Plainly), do certify as follows:

a. We have with care and diligence personally observed and examined on the date of this certificate, namely, on the 7 day of MAY, 19 68, MIRIAM WINTER (Insert name of Patient) now residing or being at _____ in the county of _____ and as a result of such examination, find and hereby certify to the fact that he is mentally ill and a proper subject for care and treatment in an institution or facility for the mentally ill under the provisions of the Mental Hygiene law.

b. We have formed this opinion from the history of the case and my examination of the patient as given above.

c. We hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

SIGNATURE _____ M.D. ADDRESS _____

SIGNATURE _____ M.D. ADDRESS _____

BEST COPY AVAILABLE

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

HISTORY OF PATIENT

(Doctor's Notes)

- 3 -

NAME OF INSTITUTION: CENTRAL ISLIP STATE HOSPITAL	
NAME OF PATIENT: WINTER, Miriam	
IDENTIFICATION NO.:	HOSPITAL NO.: 58008

ON BEING DEPRESSED, EXCITED AND EXHAUSTED. ORIENTATION: GOOD. RECENT MEMORY: GOOD. REMOTE MEMORY: MILDLY IMPAIRED. RETENTION & RECALL: GOOD. COUNTING & CALCULATIONS: GOOD. SCHOOL & GENERAL KNOWLEDGE: GOOD (HIGHER THAN THE EDUCATIONAL LEVEL AT TIMES.) ABSTRACTION ABILITY: GOOD. INSIGHT: MORE IMPAIRED ON PERSONAL MATTERS THAN ON INTERPERSONAL MATTERS. JUDGMENT: NORMAL.

Christine Jordan, M.D./jc

May 14, 1968: Cardiolipin Slide Flocculation Test: Nonreactive.

/jc

May 22, 1968: Patient is seen on Ward 3 West. She is seen in her own clothes dressed fairly neat and clean. Patient is well oriented. She denies hallucinations and suicidal ideations. In responding she is spontaneous. At times she gets excited when thinking of her private problems at the hotel. Her religious preoccupations are still the same. Medication: Navane 5 mg. t.i.d.

Christine Jordan, M.D./jc

May 29, 1968: Patient is seen on Ward 2 East. She appears fairly neat and clean; her hair is unkempt. She is oriented to time, place and person. Affect is appropriate; mood is mostly calm. However, she gets excited speaking about her admission to the hospital. "I am a Christian scientist, I am free, I am forced on this place. I don't need the medicine, this is done against my belief. I would like to go to Ward 2 West. This place is more prettier." No suicidal or homicidal ideations could be elicited. Patient denies hallucinations. Medication: Thorazine 50 mg. t.i.d. and Stelazine 5 mg. b.i.d.

Christine Jordan, M.D./jc

June 2, 1968: Patient was seen on Ward 2 West. Patient appears fairly neat and clean in hospital clothing, hair is unkempt. She is calm, her productions are made spontaneously. No hallucinations, no suicidal or homicidal ideations could be elicited. Patient is complaining about open blisters on her feet. She gets soaks, bacitracin ointment and D/C D. Medication: Mellaril 25 mg. t.i.d. and Tetracycline 250 mg. q.i.d. x4 days.

Christine Jordan, M.D./jc

BEST COPY AVAILABLE

June 12, 1968: Patient is seen on Ward 2 East. She appears fairly neat and clean. Her facial expression is sad, "Because I have to stay so long in this hospital although I am feeling well." There can be no suicidal nor homicidal ideations elicited nor sense deceptions. Patient is well oriented. She is said not to be very sociable on the ward. All blisters are healed up. Medication: Haldol 2 mg. q.i.d.

Christine Jordan, M.D./jc

June 18, 1968: CHANGE OF STATUS: Patient was today found willing and suitable for Voluntary Status.

Thomas DaCorta, M.D./jc
Supervising Psychiatrist

June 19, 1968: HONOR CARD GRANTED: Since no homicidal or suicidal ideations elicited, patient was today granted an honor card.

Thomas DaCorta, M.D./jc
Supervising Psychiatrist

June 27, 1968: Diagnosis made today: SCHIZOPHRENIA, PARANOID TYPE.

Thomas DaCorta, M.D./jc
Supervising Psychiatrist

July 12, 1968: Patient is residing on Ward 1 East. Her facial expression is usually sad and she doesn't socialize very much. On the other hand, she's not depressed, she is only waiting for her welfare and release she states. No suicidal and homicidal ideations could be elicited. Patient is well oriented. Medication: Melleril 50 mg. t.i.d.

Christine Jordan, M. D./bm

July 17, 1968: This is the first admission on May 13, 1968, on a Two Physician's Certificate, which was converted to a Voluntary Status on June 18, 1968. She was admitted because she was confused, unable to care for herself, expressing p rsecutory ideas. She adjusted well to the hospital routine and responded to chemotherapy and structured milieu. Symptoms abated. She has little insight into her problem. She is a Christian Scientist in religion. However, she takes her medication and is no problem at ward adjustment. Helps at ward cleaning. She is anxious for her release and will be maintained by welfare. Discharge to own custody approved. Mental Diagnosis: Schizophrenia; Paranoid type. Mental Condition: Much improved.

Catherine Dermgoble, M. D./bm
Supervising Psychiatrist

FORM 57 MED. (3 57)

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

HISTORY OF PATIENT

(Doctor's Notes)

-5-

NAME OF INSTITUTION:	
NAME OF PATIENT: WINTERS, MIRIAM	
IDENTIFICATION NO.:	HOSPITAL NO.: 58008

July 19, 1968: DISCHARGED: Patient was today discharged to her own custody, to attend Special Services Center, 119 West 31st Street, New York City, New York. Medication: Mellaril 50 mg. b.i.d. One week supply given.

MENTAL DIAGNOSIS: SCHIZOPHRENIA; PARANOID TYPE.

MENTAL CONDITION: MUCH IMPROVED.

FRANCIS J. O'NEILL, M. D.
DIRECTOR

per _____, M.D.
Thomas DaCorta, M. D./bm
Supervising Psychiatrist

FORM 124 REC. (3 67)

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

174a

CLINICAL SUMMARY

(NAME OF INSTITUTION)

NAME:	IDENT. NO.:	HOSPITAL NO.:
WINTERS, MIRIAM	108 66 88	55008

SEX:	AGE AT ADMISSION:	CITIZENSHIP:	DATE OF ADMISSION:
M ☐ F ☒	57	U.S.A. ☐ Resident Alien ☐ Non-Resident ☐	5/16/68

MARITAL STATUS:	DATE OF SUMMARY:
Single ☒ Married ☐ Widowed ☐ Divorced ☐ Separated ☐	7/16/68

NAME AND ADDRESS OF NEAREST RELATIVE:	DIAGNOSIS:
No correspondents	SCHIZOPHRENIA; PARANOID TYPE.

SUMMARY OF FIRST ADMISSION

Information taken from patient and hospital records. Dr. Jordan/bm

FAMILY HISTORY: Patient's father was F. W. Winter, M. D. He died in April, 1937. Patient stated that he was a psychiatrist and a Supreme Court examiner in New York State. He took care of everything in his family. Her mother was Marianne Lorden. She died on November 8, 1927. Patient has no siblings. Patient denies mental illness in her family.

PERSONAL HISTORY: Patient was born June 10, 1910. Patient was taught at home for ten years until she was 18 years old. She never had a job. She states to have had an eccentric life. After the death of her parents, the patient was living on the money she inherited and ten years ago she was put on welfare. She states she had an affair with a man, but she has never married. Patient states to be religious but does not go to church. She is of the Protestant faith. "I am an independent Christian scientist." Patient denies the use of alcohol and cigarettes.

ONSET AND SYMPTOMS: Patient had a history of persecution and religious preoccupation. She had a Bible in her hand at the time of admission. She stated she went to Bellevue only for a few days of rest, "But I was tortured there. People bother me, they want to kill me with their medication."

AT BELLEVUE: Patient was admitted May 2, 1968. Patient was circumstantial, vague, evasive, hostile, and paranoid. Her thinking was very rigid and concrete with impoverished associativity. No insight and her judgment was nil. Her affect was inappropriate. Patient is not able to take care of herself and needs long term hospitalization.

FIRST ADMISSION:
CENTRAL ISLIP STATE HOSPITAL: Patient was admitted to this hospital on [illegible], on a 330 Psychiatric Certificate. [illegible] Patient is [illegible] and states that she is [illegible] Patient is [illegible] Patient is [illegible] Patient

were the only parties to demand a jury trial, once it was selected, all parties consented to a jury determination of all the issues. Plaintiff's counsel requested at the end of the case that the damages against the defaulting defendants, Grant and Kosovic, be decided by the jury rather than the court. The form of verdict which was submitted to the parties in advance and was used by the jury contained spaces for recording a decision for the plaintiff or for the defendant with respect to each defendant, as well as for fixing damages, both compensatory and punitive, but the jury was instructed that they should find for the plaintiff with respect to Doctors Grant and Kosovic. The jury verdict, however, comprised findings for each defendant, including Doctors Grant and Kosovic.

Discussion

The plaintiff's eighteen grounds to set aside the verdict will be examined separately.

1. Plaintiff argues that the jury's verdict for defendants Grant and Kosovic indicates that they disregarded the court's instructions, and that this disregard requires a new trial as to all defendants. The cases which are cited in support of this proposition bear too little resemblance to the facts here for any useful comparison. Nor is the general statement in 6A Moore's Federal Practice ¶ 59.08[4], p. 59-139 (1974) any more relevant.

She was eager to end the interview because of feeling too exhausted. She was fairly cooperative, her productions were undu spontaneously. Speech was mostly coherent and relevant. Affect was quite appropriate, her mood was euthymic and, at times she got excited. Patient stated that she is a Christian Scientist. She showed religious preoccupations and mild feelings of persecution. She accused the events in her life on being depressed, excited and exhausted. Orientation: good. Recent memory: good. Remote memory: mildly inadequate. Retention and recall: good. Counting and calculations: good. School and general knowledge: Good (higher than the educational level at time). Abstraction ability: good. Insight: more impaired on personal matters than on impersonal matters. Judgment: Normal.

SUBSEQUENT COURSE: Following the interview, patient resided on Ward 3 West. She was well oriented and denied hallucinations and suicidal ideations. In responding, she was spontaneous. Patient was then transferred to Ward 2 East, where she appeared fairly neat and clean, and her hair was unkempt. Affect was appropriate, mood is mostly calm. However, she got excited when speaking about her admission to this hospital. Patient complains about open blisters on her feet. She got socks, bacitracin ointment and D n L. Medication prescribed to this patient was Mellaril 25 mg. t.i.d. and Tetracycline 250 mg. c.i.d. x 4 days. More recently, patient is residing on Ward 2 East. She appears fairly neat and clean. Her facial expressions are sad. No suicidal or homicidal tendencies could be elicited, therefore, patient was granted an Honor Card on June 19, 1968. June 18, 1968, patient was found to be willing and suitable to be a Voluntary patient. As a Voluntary patient, she is waiting to be seen for consideration of her release.

MENTAL DIAGNOSIS: SCHIZOPHRENIA; PARANOID TYPE.

July 17, 1968: This is the first admission on May 13, 1968, on a Two Physician's Certificate, which was converted to a Voluntary status on June 18, 1968. She was admitted because she was confused, unable to care for herself, expressing persecutory ideas. She adjusted well to the hospital routine and responded to chlorothermy and structured milieu. Symptoms abated. She has little insight into her problem. She is a Christian Scientist in religion. However, she takes her medication and is no problem at ward adjustment. Helps at ward cleaning. She is anxious for her release and will be maintained by welfare. Discharged to own custody approved.

MENTAL DIAGNOSIS: SCHIZOPHRENIA; PARANOID TYPE.

MENTAL CONDITION: MUCH IMPROVED.

Catherine Dromgole, M. D./bn
Supervising Psychiatrist

JULY [illegible], 1968: DISCHARGED: Patient was today discharged to her own custody, to attend Social Services Center, 119 East 31st Street, New York City, New York. Medication: Mellaril 25 mg. t.i.d. The [illegible] MENTAL CONDITION: IMPROVED; WELL-ADJUSTED. Mental

[illegible]
Supervising Psychiatrist

SOCIAL SERVICE RECORD

Hospital No. 58208/FAS

Name WINTER, Miriam Identification No.

ACTIVITY SUMMARY

May 16, 1968: Patient is a 58 year old white single female, brought from Bellevue on a first hospital admission. She was apparently taken to Bellevue by police from her hotel room after welfare department notified them that she was causing trouble about transferring to another room. Patient was seen by the SW as she wanted to inquire about her possessions at Bellevue and was informed the things would be forwarded.

May 17, 1968: Miss Winter asked Social Worker to contact Mr. Benjamin Rippe, in Brooklyn, at 625-1441, who is her Christian Scientist practioner. He was called and will be in touch. A friend and fellow Christian Scientist, Mrs. Gertrude Butler, 8 Remsen St., New York City, phone: TR 5-1240; was also contacted to inform her of patient's whereabouts. Patient was very angry and upset, accusing the "rotten" welfare department of sending the police to her for no good reason. Also indignant due to the fact that she is a Christian Scientist and is being forced to take medication. She is constantly berating the hospital and officials for violating her personal rights and privileges as a human being and as a Christian Scientist. She says she will seek court action to get her out and that she would fight those violations, to try and attain a victory on behalf of human rights for an American citizen and specifically for the beliefs of all Christian Scientists.

May 20, 1968: Saw Miss Winter to relate success in contacting friends; she was exceedingly belligerent and complaining about the staff taking her dress to be cleaned, saying they were sure to ruin it. She feels the hospital is in cahoots with the welfare department and both are keeping her prisoner.

May 23, 1968: A request for a $4.00 loan from Mrs. Butler was made to pay patient's phone bill at the King Edward Hotel, 120 W. 44th St., New York City, to enable property team to pick up possessions left there. At this visit, patient appeared much calmer and less complaining. She stated that her calmness was a sign that she was "sick."

M. Koster

M. Koster/ha
PSW Trainee II

SOCIAL SERVICE RECORD

Hospital No. 58008/FAS

Name WINTER, Miriam Identification No.

ACTIVITY SUMMARY

June 25, 1968: Welfare referral sent in for patient coinciding with change to voluntary status. She is preoccupied with leaving and approaches worker at every opportunity for discussion of it. She says she will leave on her own if Welfare has not come thru by discharge date. The patient's mood has remained essentially unchanged since admission. She continues to be preoccupied and very anxious concerning picuine personal matters. She is extremely unhappy and sits listlessly on the ward all day except for short periods when she nervously paces about.

July 8, 1968: Patient was seen by staff and approved for discharge. An appointment with Welfare for July 18, 1968, was confirmed today. During the past week in talking with the worker, she has constantly expressed alternate wishes about leaving on her own or waiting for Welfare. She displays no insight or judgment in making future plans. After approved by staff, Miss Winter attempted to contact Mrs. Butter so that she could leave immediately and stay with her. Social Worker called Mrs. Butter that afternoon, asking if this was possible and was told that it was not. Miss Winter now says she will stay until the appointed date, but alternates this with announcements and questions about leaving on her own. The patient uses her honor card occasionally to sit outside. She does not socialize, and says she prefers to do absolutely nothing, because she is so sad.

Marilyn Koster

Marilyn Koster
PSW Trainee II

MK/ap

Form 120 DMH (10/66)

Chart: "T1-95-61

5/13

STATE OF NEW YORK - DEPARTMENT OF MENTAL HYGIENE

ORDER OF TRANSFER UNDER SECTION 78, PAR. 5,

MENTAL HYGIENE LAW

Albany, N.Y., May 9, 19 63.

ORDERED THAT Miriam Winter

a patient at BELLEVUE PSYCHIATRIC HOSPITAL Municipal Hospital be hereby transferred on May 13th 19 63 to Central Islip State Hospital upon execution of the certificate below by the appropriate authority of _____ Municipal Hospital and the presentation of the original admission papers and applicable court order, if any.

BY THE COMMISSIONER OF MENTAL HYGIENE

CERTIFICATION

I, Sandra Grant M.D., hereby certify that Miriam Winter was duly admitted to BELLEVUE PSYCHIATRIC HOSPITAL Municipal Hospital on May 2nd 19 63 is in need of further hospitalization at a State Hospital pursuant to provisions of the Mental Hygiene Law, and that he resides at 120 W. 44th St., N.Y.C. which is in the institution district of Central Islip State Hospital.

Sandra Grant, M.D.
Staff Psychiatrist

(Title)

_____ Municipal Hospital

Form 223 - Mod., 5/65

NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE

MEDICATION RECORD

INITIALS	NAME	INITIALS	DATE

MEDICATION - Dose & Route & Date of MD Order	TIME	MONTH 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31

Form 223 [illegible], 5.63

NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE

MEDICATION RECORD

INITIALS	NAME	INITIALS	NAME

MEDICATION - Dose & Route & Date of MD Order	TIME	MONTH / / /	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31

Form 223 -

NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE

MEDICATION RECORD

INITIA	NAME	INITIAL

MEDICATION - Dose & Route & Date of MD Order	TIME	MONTH 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31

STATE DEPARTMENT OF MENTAL HYGIENE

MEDICATION RECORD

INIT	NAME	INITIALS

MEDICATION - Dose & Route & Date of Order	TIME	MONTH 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31

(FORM 52-MSD, 131-67)

NEW YORK STATE - DEPARTMENT OF MENTAL HYGIENE

DOCTOR'S ORDER SHEET

PATIENT'S NAME

DATE OF BIRTH

IDENTIFICATION NUMBER

DRUG SENSITIVITY

SPECIFY DRUG(S)

ATTACH TO FRONT OR CHART #1 CHART

183a

DATE	DOCTOR'S ORDER & SIGNATURE	STARTED				
		Date	Nurse or Personnel Sig.			

DATE WRITTEN	DOCTOR'S ORDER & SIGNATURE	STARTED Date	STARTED Nursing Personnel Signature	DATE EXPIRED	DISCONTINUED Date	DISCONTINUED Doctor's Signature	DISCONTINUED Nurse's Signature

PRIVILEGED AND CONFIDENTIAL COMMUNICATION — FOR PROFESSIONAL USE ONLY

CENTRAL ISLIP STATE HOSPITAL

CENTRAL ISLIP, L. I., N. Y.

RE: WHITE, Miriam #58008/Fm3 WELFARE REFERRAL Date: June 25, 1968

Department of Welfare
Special Services
42 Franklin Street
New York 13, New York

119 W. 31st St.
New York, N.Y.

REPLY ATTENTION: Miss Foster
Social Worker

ATTENTION: Intake Supervisor

Dear Sir:

The above-named patient has been approved for release from this hospital on convalescent care in ~~his~~/her own custody. Patient will be expected to attend an Aftercare Clinic in the Borough where ~~he~~/she resides. This is the patient's application for public assistance and housing. Please notify Social Service when an appointment has been scheduled. The following information has been abstracted from the record.

NAME Miriam Winter HOSP. # 58008 I.D. # 102-66-03

Sex:	Female	Race:	White
Birthdate:	June 10, 1910	Religion:	Christian Science
Birthplace:	United States	Citizenship:	[redacted]
Father:	P. W. Winter	Veteran Status:	[redacted]
Mother:	Miriam Winter	Type of Discharge:	[redacted]
Education:	Convent school	Branch of Service:	[redacted]
Highest grade:	completed	Serial Number:	[redacted]
Age:	59	Social Security #:	[redacted]
Marital Status	Single	Pension	[redacted]
Maiden Name of Spouse:	[redacted]		
Date and Place of Marriage:	[redacted]		
Names and ages of children:			

RELATIVES, FRIENDS, OR AGENCIES:

Name	Address	Relationship	Able or willing to assist
None known			

Lived for 10 years prior to hospitalization.

Previously known to NYC DEPT. OF WELFARE at City, New York Hotel
Previous Residence: Street Address
Present Residential preference:

PRE-HOSPITAL BEHAVIOR: Miriam was taken to Bellevue Hospital from her hotel room when she refused to change her clothes and locked herself in. On arrival, she was excited and upset due to these events. She elicited feelings of persecution and retribution about using her private life and her religious.

215-Adm. (9-59)

45-8-008

State of New York
Department of Mental Hygiene

.....

Date: .....

REQUEST FOR RELEASE

TO: Dr. DeCosta

I, have been admitted to the Central Islip State Hospital on
(Name of Institution)

5-13-68, hereby ask to be released by ~~(placement on convalescent care)~~ (direct discharge).
(Date) (Strike out clause that is not applicable)

William Winters
(Signature of Applicant)

Vol 6-18-68

186 A

Date of Present Admission: May 13, 1953
Admitted from: Bellevue Psychiatric Hospital
Number of Previous Hospital Admissions: None

DIAGNOSIS: Schizophrenia, Paranoid Type.

HOSPITAL ADJUSTMENT: Patient resides on an open ward and has an honor card.

PHYSICAL DISABILITIES: (NO) YES (If YES, Describe)

EMPLOYMENT HISTORY: Never worked.

EMPLOYABILITY AND TYPE OF WORK DESIRED: Has never worked.

PATIENT IS ABLE TO:

Handle funds: Yes
Live Alone: Yes
Share bath facilities: No
Share kitchen facilities: No
Climb stairs: Yes

SPECIAL ALLOWANCES AND NEEDS OF THE PATIENT:

Diet: No
Carfare: Yes
Restaurant: No
Laundry: No
Clothing: Toiletries.
Eyeglasses: No
Dental Work: No
Medication: Mellaril 25 mg. t.i.d.
Other:

ADDITIONAL INFORMATION: Beliefs: Being a Christian Scientist, medication is against her religious practices. Miss Winter has never worked and received public assistance when [illegible] from her parents and [illegible]. She is a rather eccentric woman, content and preferring to live a secluded life. On the ward, her mood has become mostly calm and quiet, [illegible] acceptably social [illegible] hospitalization and into [illegible] private [illegible]. She is spontaneous and well oriented. She is not bothersome and causes no trouble wishing only to leave the hospital and return to her former life style.

Very truly yours,

FRANCIS J. O'NEILL, M. D.
Director

STATE OF NEW YORK—DEPARTMENT OF MENTAL HYGIENE

AGREEMENT UPON LEAVING THE INSTITUTION

CENTRAL ISLIP STATE HOSPITAL
(Name of Institution)

In accepting WINTERS, MIRIAM # 58003- PAS
(Name of Patient)

on ~~Conditional/Conditional Basis~~ after having been informed of his condition, I agree
(Strike out inapplicable words)
to the following: DISCHARGED:

1. To maintain and care for the patient to the best of my ability and to follow the recommendations of the institution or clinic personnel for supervision.

2. To see that the patient, accompanied by a member of the family or friends, attend the ////////// (Clinic)
////////// (Address)
on ////////// (Date) and thereafter as requested.

3. To notify institution or clinic of the patient's condition at time specified and communicate immediately with institution or clinic of any significant changes in patient's situation, or change of address.

4. Additional agreement Medication: Mellaril 50 mg. b.i.d.
One week supply given. To go on the Bellevue Bus.
Intake interview with Dr. Feinstein 7/10/68.

I understand that the institution is not liable for expenses of the patient after he leaves the institution.

NOTE: If the return of the patient becomes necessary, he should be brought directly back to this institution whenever possible.

Signed this 12th day of July, 19 68

[illegible] (Name) Own Child (Relationship)
[illegible] (Address)

If patient is not to reside at the above address, indicate where he will reside

PLAINTIFF'S PROPOSED VOIR DIRE
QUESTIONS FOR PROSPECTIVE JURORS

1. What is your name?

2. What is your occupation? How long have you held that position? [If for less than five years, previous occupations.]

3. Where do you live? How long have you lived there? [If for less than five years, previous address.]

4. Do you know any of the parties to this action?

5. Have you, any relative, or close friend ever employed at Bellevue Hospital, Central Islip State Mental Hospital, or any other mental hospital? If so, please explain.

6. Have you, any relative, or close friend ever been a patient at Bellevue Hospital, Central Islip State Mental Hospital, or any other mental hospital? If so, please explain.

7. Have you ever begun, assisted in, or participated in any proceeding to have another person committed or admitted to a mental hospital? If so, please explain.

8. Have you ever begun, assisted in, or participated in any proceeding to get another person discharged or released from a mental hospital? If so, please explain and state whether you were successful.

9. Have you, any relative, or close friend ever worked as a physician, psychiatrist, psychologist, psychiatric social worker, or related profession? If so, please explain.

10. What are your views concerning the reliability of the testimony of a former mental patient?

11. What are your views concerning the involuntary commitment of persons who have never injured or threatened to injure themselves or any other person? Do you believe such persons should be hospitalized against their wills?

12. What are your views concerning the involuntary treatment of persons who have never injured or threatened to injure themselves or any other person? Do you believe such persons should be treated against their wills?

13. Do you believe mental illness can be treated and cured? Please elaborate.

14. Do you believe that psychiatry has advanced to the state of a science? Please elaborate.

15. Do you think all mental patients are dangerous? Do you think most mental patients are dangerous? Please elaborate.

16. Do you consider yourself to be a very religious person? A moderately religious person? A not very religious person?

17. Do you think that honoring and respecting another person's religious beliefs is very important? Moderately important? Not too important?

18. Do you think that psychological pain can be as real and devastating as physical pain?

19. Do you have any doctors, nurses or psychiatrists in your family?

20. Have you ever been involved in any way with a suit involving medical treatment?

21. Have you ever personally had any experience with either yourself or immediate member of your family in a hospital or mental institution?

22. Have you ever had treatment by drugs which had strong side effects upon you?

23. Do you think a person's right to privacy extends to the right to control his or her own body?

24. Do you think the right to privacy includes the right also to be free from humiliation or embarrassment even by people who claim to be doing it for your good?

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Plaintiff proposes the following set of jury instructions. Most of the instructions are taken verbatim from the jury instructions in the case of O'Connor v. Donaldson, which were found to be "adequate instructions" by the Supreme Court's decision in that case (43 U.S.L.W. 4929 at 4934 note 12). The Donaldson instructions have been modified to incorporate the Supreme Court's ruling in Wood v. Strickland. It should be noted that the majority of the instructions used in the Donaldson case, and proposed here, are taken verbatim from two standard sources, Federal Jury Practice and Instructions, Devitt and Blackman (1970 Vol. 2), and Jury Instructions on Medical Issues, Alexander (1966).

* * * * * *

38. The Plaintiff claims that she was forced to take such drugs even though she had never been found to be mentally ill or mentally incompetent by any judge or jury; even though she was not suicidal or homicidal and had never injured or threatened to injure herself or any other person; and even though there was no medical emergency, and administration of such drugs was not necessary to save her life.

39. You are instructed that in the case of an ordinary patient, suffering from a physical ailment, the hospital

authorities have no right to impose compulsory medical treatment against the patient's will, and to do so would constitute assault and battery.

40. Furthermore, the law is quite clear in New York that a finding of mental illness, even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is incompetent or unable adequately to manage his or her affairs.

41. You are instructed that a mental patient who has not been found to be mentally incompetent by a judge or jury does have a constitutional right, on religious grounds, to refuse to take drugs that are not necessary to save that patient's life, and that injecting such a patient with drugs, or forcing such a patient to take drugs orally, would violate that patient's constitutional rights.

42. At this trial, however, you are not asked to determine whether the Plaintiff's constitutional rights were violated, or whether she is entitled to relief. At an earlier stage of these proceedings, the United States Court of Appeals for this judicial circuit reviewed this case. That Court ruled that Plaintiff's constitutional rights were violated when she was given medical treatment over her objections, which were religious in nature, and that she is therefore entitled to relief.

43. Accordingly, it is settled for this case, and you are instructed to find, that Plaintiff's constitutional rights

were violated when she was forced to take medication under the circumstances of this case. The primary issue for you the jury to determine is whether one or more of the Defendants sued in this case should be held personally responsible in money damages for those violations of Plaintiff's constitutional rights.

44. In order for Plaintiff to recover money damages from one or more of these Defendants, the burden is upon the Plaintiff to establish by a preponderance of the evidence:

First, that one or more of the Defendants had some degree of personal responsibility for those violations of Plaintiff's constitutional rights; and

Second, that those violations caused or contributed to any physical or non-physical injury or damages that Plaintiff suffered.

45. If you find, for example, that one or more Defendants knew or should have known that Plaintiff was receiving medication over her religious objection and, having the authority to do so, took no steps to prevent that violation, that would constitute sufficient personal responsibility to justify the award of money damages against that Defendant.

46. This does not mean, however, that a particular Defendant must have known Plaintiff by name, or known that she was a patient in a hospital under his or her authority, or known that she was forced to receive drugs over her religious

objection. If you find, for example, first, that one or more of the Defendants knew that some mental patients in hospitals under their authority might object to drugs on religious grounds, or that it was reasonably foreseeable that such objections might be raised, and find, second, that such Defendants could have prohibited, prevented or regulated the administration of drugs to such patients, either through direct orders or through issuance of regulations, rules, policies, or guidelines; and find, third, that such Defendants omitted, failed, or refused to take such steps; this would constitute sufficient personal responsibility to justify the award of money damages, subject, however, to any defense of good faith such defendants may establish.

[Instructions 47 through 51 should be given only with respect to those Defendants, if any, who introduce testimony or other evidence to support a good faith defense.]

47. Defendants [specify by name] claim that if they did violate Plaintiff's constitutional rights, they did so unintentionally, and that they acted in good faith and with a reasonable belief that their acts, conduct, omissions of failures to act did not violate Plaintiff's constitutional rights.

48. I will refer to this contention, for simplicity, as the "good faith defense." You are instructed that good

faith, as derined in these instructions, is a defense. Accordingly, if you should believe from a preponderance of the evidence that a Defendant reasonably believed, in good faith, that his or her acts, conduct, omission, or failures to act did not violate what he or she knew to be, or what he or she should reasonably have known to be, Plaintiff's constitutional rights, then you should enter a verdict for that Defendant, even if you find that that Defendant's acts, conduct, or omissions, or failures to act did violate Plaintiff's constitutional rights.

49. The burden is upon each Defendant to prove each element of this good faith defense by a preponderance of the evidence. As a corollary, Plaintiff need not prove that the Defendants acted maliciously, or with ill-will, or in bad faith, in order to prove her claim. All that is required is that she prove that a particular Defendant's acts, conduct, omissions, or failures to act amounted to a violation of her constitutional rights. The burden would then be upon that Defendant to prove that he or she should not be liable for money damages for the violation because he or she acted in good faith.

50. If you find that a Defendant violated Plaintiff's constitutional rights and find further that that Defendant acted in good faith, or failed to carry his or her burden of proving that he or she acted in good faith, as de-

fined herein, then you should enter a verdict for that Defendant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, Plaintiff, - against - ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to plaintiff, Defendants.	NOTICE OF APPEAL 69 C 783

PLEASE TAKE NOTICE that the plaintiff, MIRIAM WINTERS, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment and order of the Honorable Orrin G. Judd, United States District Judge, Eastern District of New York, entered by the Clerk of said Court on the 19th day of December, 1975, and from each and every part of said judgment and order and from any rulings, orders or decisions effecting the outcome or relating to the outcome of the above-captioned case.

DATED: NEW YORK, NEW YORK
January 13, 1976

Jonathan A. Weiss

JONATHAN A. WEISS, Esq.
Attorney for Plaintiff
Legal Services for the
Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MIRIAM WINTERS,

Plaintiff,

-against-

ALAN D. MILLER, M.D., ET. AL.,

Defendants.

----------x

CIVIL ACTION
69 c 783
(OGJ)

ORDER

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
FEB 19 1976

Upon hearing and filing plaintiff's Motion [illegible] Leave to appeal in forma pauperis, pursuant to Rule 24 of the Federal Rules of Appellate Procedure, and for a free transcript, pursuant to 28 U.S.C. §753(f), and upon the affidavits of plaintiff Miriam Winters and plaintiff's attorney, Jonathan A. Weiss, both sworn to February 4, 1976, in support of the motion, and there being no opposition thereto.

IT IS HEREBY ORDERED that plaintiff shall be permitted to proceed on the appeal in forma pauperis, and shall be entitled to a free copy of the transcript of the proceedings in the above entitled action, except for those portions heretofore transcribed.

Dated: New York, New York
February 17, 1976

ORRIN G. JUDD
U.S. District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS D'CORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to plaintiff,

Defendants.

SUPPLEMENTAL NOTICE OF APPEAL

69 C 783

PLEASE TAKE NOTICE that the plaintiff, MIRIAM WINTERS, hereby appeals to the United States Court of Appeals for the Second Circuit from the Supplemental Decision and Order of the Honorable Jacob Misher, Chief Judge, United States District Court for the Eastern District of New York, entered by the Clerk of said Court on the 2nd day of March, 1977. The appeal from this Decision and Order will be prosecuted as part of and in conjunction with the original appeal in this matter now pending in the United States Court of Appeals for the Second Circuit.

DATED: New York, New York
March 7, 1977

JONATHAN A. WEISS
Legal Services for the
Elderly Poor
Attorney for Plaintiff
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

BEST COPY AVAILABLE